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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 387

TRANSCONTINENTAL & WESTERN AIR, INC.,
Petitioner,

against

CIVIL AERONAUTICS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 387

TRANSCONTINENTAL & WESTERN AIR, INC.,

Petitioner,

against

CIVIL AERONAUTICS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Court of Appeals is reported in 169 F. (2d) 893. It appears at pp. 111-115 of the Transcript of Record. The majority opinion of the Civil Aeronautics Board, which has not yet been officially printed, appears at pp. 60-91, and the dissenting opinion appears at pp. 92-108, of the Transcript of Record.[1]

[1] For brevity, the following abbreviations will be used hereafter. Numbers in parentheses refer to the pages of the Transcript of Record. The "Act" means the Civil Aeronautics Act of 1938, as

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (see Pub. L. 773, 80th Cong., 2d Sess., c. 646) and §1006(f) of the Civil Aeronautics Act of 1938 (52 Stat. 1024; 49 U. S. C. §646(f)). The order of the Court of Appeals was entered on August 2, 1948. Petition for a writ of certiorari was filed on October 30, 1948, and granted on December 6, 1948 (93 L. ed. adv. op. 125).

Statement of the Case

Petitioner is an air carrier engaged in transporting persons, property and mail by aircraft in the United States and elsewhere under certificates of public convenience and necessity issued under the Act by respondent, Civil Aeronautics Board.

Section 406(a)(1) of the Act empowers and directs the Board, upon its own initiative or upon petition of the Postmaster General or an air carrier, "to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft . . . by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper . . .".

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amended. Act of June 23, 1938, c. 601, 52 Stat. 973, as amended, 49 U. S. C. §§401-691. See Appendix B, *infra*. The Civil Aeronautics Board and its predecessor, the Civil Aeronautics Authority, will be called "the Board." (The functions of the Authority were transferred to the Board by Reorganization Plan No. IV, effective June 30, 1940. 54 Stat. 1235, 5 Fed. Reg. 2421). Petitioner will sometimes be called "TWA."

Unless otherwise stated, all italics are ours.

The basic question is whether the Board has any *power* to determine that a new rate for carrying the mail should be made effective from a date prior to the filing date of the airline's petition. Whether TWA should obtain such relief, on the merits, is not the question here. The merits have not been examined—the Board has been held powerless to examine them. The question of power arose in the following manner.

1. The Petition for a New Rate

By petition filed March 14, 1947 (8-13), TWA applied to the Board, pursuant to §406 of the Act, for an order fixing and determining fair and reasonable rates of compensation, effective January 1, 1946, for transporting mail by aircraft over certain routes (designated as routes Nos. 2, 38, 44 and 58) operated by it wholly within the United States. That petition stated, in substance, the following.

By order dated October 26, 1945, the Board reduced TWA's rate for carrying mail over its domestic routes to 45¢ per ton mile, retrospectively effective as of January 1, 1945 (10)[2]. TWA suffered losses in every month after the issuance of that order except June 1946 (9-10). These losses were partly due to a common postwar experience: costs kept rising while mail revenue declined (8). They were largely caused, however, by conditions peculiar to TWA.

TWA first received new 4-engine Constellation aircraft in September 1945 (8). Because of certain controversies, these airplanes were not placed in service until

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[2] *Transcontinental & Western Air, Inc., Mail Rates,* 6 C. A. B. 595.

February 1946 (8-9). By June 1946 enough Constellations were in operation to enable TWA to report a net profit for that one month (9).

On July 11, 1946, however, all Constellations were suddenly grounded by the Administrator of Civil Aeronautics (9). This grounding was beyond TWA's control. No other domestic airline then had Constellations in operation (9). Because of the grounding, all TWA's Constellations were out of revenue service until the middle of September 1946, and many for even longer (9). Meanwhile virtually all TWA's costs continued (9). Instead of enjoying anticipated profits from summer operations, TWA suffered serious losses (9).

That blow was hardly over when, on October 21, 1946, TWA's operations were completely shut down by a strike of its pilots (9). The pilots had demanded higher wages. A Fact Finding Board appointed by the President of the United States under the Railway Labor Act, which is applicable to air carriers, recommended an increased pay scale. TWA promptly put the recommendation into effect (9). Nonetheless the pilots served an ultimatum demanding an even higher wage scale within 30 hours (9). If TWA had granted the pilots' demand, its costs would have been even higher (9). The strike then ensued. The shutdown following the strike continued for almost four weeks and caused further severe financial losses (9).

The petition alleged that the old 45¢ rate had not been fair and reasonable since January 1, 1946 (10) and, pursuant to §406(c) of the Act, proposed a new rate (11).

2. The Procedure Below

On May 27, 1947, Public Counsel of the Board moved that the Board, without hearing the merits, dismiss so much of TWA's petition as requested a new mail rate for the period from January 1, 1946 to March 14, 1947, the date the petition was filed. The principal ground of this motion was that "as a matter of sound general policy" the Board should not make such a retrospective adjustment (15).

On June 11, 1947, TWA answered this motion, pointing out that the Board had the duty to hear and consider the merits of any petition involving matters within its jurisdiction (22-25). Thereafter, on June 23, 1947, Public Counsel amended their motion to dismiss by adding a new ground: that the Board had "no authority" to adjust a rate retroactively (38).

After oral argument (41-60), the Board granted the motion by an order dated December 2, 1947 (91). Dismissal was not on the merits, nor in the exercise of discretion, but solely on the ground—advanced by a majority of three members—that the Board lacked *power* to fix a rate effective before the date the petition was filed (63-90). Member Lee dissented with an opinion (92-108).

On January 30, 1948, TWA applied for review of the Board's order by the United States Court of Appeals for the District of Columbia which, on August 2, 1948, affirmed the Board's order with an opinion by Judge Prettyman (111-115). Petition for certiorari was granted by this Court on December 6, 1948 (118).

Specification of Errors

1. The Court of Appeals erred in holding that the Act does not empower the Board to pass on the merits of TWA's petition of March 14, 1947, asking that a new mail rate be made effective from a date prior to the filing of the petition.

2. The Court of Appeals erred in failing to hold that the Act, and particularly §406(a)(1) thereof, delegates to the Board the power of Congress to set a new rate for TWA retrospectively effective as of a date which the Board determines to be proper, whether or not it antedates March 14, 1947.

3. The Court of Appeals erred in holding that the Board's power to fix mail compensation under the Act is limited by an "almost conclusive presumption against power to take retroactive action," when no such presumption applies.

4. The Court of Appeals erred in holding that §406(a)(1) of the Act should be judicially circumscribed by false analogies to other statutes differing completely in language and purpose, and particularly to statutes regulating the rates of public utilities engaged in two-dimensional activities.

5. The Court of Appeals erred in holding that the Board is empowered to change mail rates retrospectively only from the initiation of the rate proceeding and in failing to hold that the practical considerations which compel pub-

lic utility rates to be changed only prospectively have no application to mail compensation.

6. The Court of Appeals erred in holding that the Board has no power to determine that a mail rate was excessively high prior to the initiation of a rate proceeding and that in consequence the Board is likewise powerless to determine that a mail rate was unreasonably low prior to such initiation.

7. The Court of Appeals erred in holding that the legislative history of the Act shows that the provision of §406(a) giving the Board power "to make such rates effective from such date as it shall determine to be proper" should be given a limited effect.

8. The Court of Appeals erred in failing to hold that the Board's previous exercise and acknowledgment of its power to make mail rates effective as of dates prior to the institution of a rate proceeding constitutes an administrative interpretation entitled to particular weight in the construction of the Act.

9. The Court of Appeals erred in failing to hold that the Act, if interpreted to deny the Board any power to increase mail rates effective from a date prior to initiation of a proceeding to revise an old rate, would violate the Fifth Amendment to the Constitution of the United States, in that it would deprive petitioner of property without due process of law and take its property without just compensation.

10. The Court of Appeals erred in affirming the order of the Board.

Summary of Argument

Whenever the Board fixes a future mail rate, it makes a prophecy. In the field of air transportation, mail pay prophecies are peculiarly speculative. When events show that a prophecy was wrong, the Board is required to correct it. So the Act provides. Indeed, since the airlines are required to carry the mails, revision is constitutionally necessary.

Mail rates must always be sufficient to enable the airlines to carry out the Act's objectives, as expressed principally in §2 and §406(b). Hence §406(a)(1) both empowers and directs the Board "to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft . . . and to make such rates effective from such date as it shall determine to be proper."

The basic issue in this case is simple. Changing a mail rate for the future does not remedy its past unfairness. Concededly the Board has full power to adjust the rate back to the filing date of the proceeding brought to revise the rate. The question here is whether its power to fix a *proper* effective date is arbitrarily limited by the start of that proceeding, or whether it has power, after hearing the facts and weighing the merits, to determine that a rate adjustment should *properly* be made effective as of a day antedating that filing date.

It is not necessary to speculate as to the Congressional "intent." The Board was given power to make its rates "effective from such date as it shall determine to be proper." Those are not words of limitation but of complete delegation of discretion. For many years Congress

itself exercised the power to adjust mail pay retrospectively. By §406(a)(1) Congress delegated to the Board full power to correct false prophecies by adjusting mail rates retrospectively, not a limited power to adjust them back only to the filing date of a rate proceeding and no further.

Read as a whole, the Act compels the same conclusion. Its purposes require that the language be given its plain meaning. When Congress gave the Board power to change "public utility" rates—passenger and cargo rates—as distinguished from mail compensation, it expressly limited the Board to making changes effective only for the future or "from the date of filing" of the proceeding, rather than from *any* date "it shall determine to be proper." The distinction reflects long-standing practical differences between public utility and mail rates. It underscores the breadth of the power conferred by §406(a)(1).

For ten years the Board has been making rates effective as of dates prior to the start of a rate proceeding. Its only statutory authority for this action was derived from §406(a)(1). After a decade it set out to discover "whether the section was not intended to have a somewhat narrower meaning" (68). Suddenly it found that language which it had earlier termed "plain" had somehow become "ambiguous." It and the Court of Appeals created, and then resolved, that ambiguity by a series of false analogies and unsound policy arguments.

Thus, it was claimed that a narrower construction is justified by an analogy to usual public utility rate determination statutes, although the Act itself refuses to draw the analogy. It was contended that to interpret §406(a)(1) the way it reads would "guarantee" a profit to

every airline regardless of the character of its service, totally ignoring the standards prescribed in §406(b). It was argued by the Court that our contention would empower the Board to lower rates retrospectively. To that we agree, and we are puzzled by the Court's concern. If the airlines are to be protected against unreasonably low mail rates, the Government should be protected against unreasonable profits accruing from excessively high mail rates. Numerous other arguments of like nature were advanced.

While all these arguments are unsound, as we shall show in detail, their basic fallacy is that they erect variable *policy* considerations into a rigid limitation on the Board's *power*. Questions of policy are for Congress to resolve. Congress resolved them in no uncertain terms. Its only statement as to what it was trying to accomplish, contained in the Conference Report on the Act as it was finally passed, confirms the fact that §406(a)(1) was intended to give the Board the broad, flexible power to fix rates as of any date determined to be proper after hearing the evidence pro and con.

The only question involved here is whether TWA shall have the opportunity to present evidence on the "proper" effective date of an adjusted rate. A decision granting TWA a hearing will merely enable the five-man Board to weigh the facts. If the facts do not justify the Board in increasing the rate retrospectively, the Board will not be bound to take that action. By refusing a hearing on the point, the decision below frustrates the basic policy of the Act to afford full relief to an airline whose economic soundness has been impaired by events unforeseen when the Board's previous rate prediction was made.

POINT I

The Act clearly delegates to the Board the power which has been held non-existent.

Under the Act, carrying air mail is not a matter of choice. Every air carrier authorized to carry mail must "transport mail whenever required by the Postmaster General." §401(m), 49 U. S. C. §481(m); *cf.* §401(k), 49 U. S. C. §481(k). From this statutory duty flows a constitutional right to just compensation,[3] as the Act recognizes. "Such air carrier shall be entitled to receive reasonable compensation therefor as hereinafter provided." *Ibid.*

Consequently the Board is "empowered and directed . . . to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith . . . and to make such rates effective from such date as it shall determine to be proper." §406(a) of the Act, 49 U. S. C. §486(a). The "rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft." *Ibid.*

The rates which the Board is to "fix and determine from time to time" are not, therefore, rates in the abstract. They are "rates of *compensation*"—more precisely, "fair and reasonable rates of compensation."

Determining a reasonable rate of compensation for carrying the mail is no simple matter even when the services

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[3] *United States* v. *New York Central Rd. Co.*, 279 U. S. 73, 78, 79.

have already been performed and the actual results of operation are known. It is far more difficult, however, to forecast what fair compensation for carrying the mails will be in the future. Every such forecast involves a prophecy. That is true in the relatively stable field of rail transportation, although the forecaster has over a century of past experience on which to draw. It is especially true in the much newer and less stable field of air transportation.

"In air transportation we can see but dimly the shape of things to come." *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 339. "The determination of a fair rate necessarily includes consideration of the susceptibility of the industry to large and unpredictable fluctuations of net operating income." *Delta Air Corp.—Mail Rates for Route Nos. 24 and 54*, 3 C. A. B. 261, 285. Recently the Board remarked again on "the inherent weakness in prophecy as to revenues and expenses." *Pan American Airways, Inc.*, Order No. E-771, p. 6, Aug. 25, 1947. When it set TWA's mail rates in 1945, it emphasized that fact time and again.[4]

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[4] *Transcontinental & Western Air, Inc., Mail Rates*, 6 C. A. B. 595. Thus, it remarked that "accurate forecasts of future operations are complicated not only by uncertainty as to the direction in which these curves will move in the future but also because of uncertainty as to the relative timing and rate of movement of each individual curve" (pp. 597-598). ". . . it is not possible under existing circumstances to arrive at a fully reliable determination of the probable future mail costs" (p. 600). Likewise it referred to "the dynamic conditions now developing" (p. 601).

This decision appeared simultaneously with others setting the same 45¢ mail rate for three other domestic airlines. *Eastern Air Lines, Inc., Mail Rates*, 6 C. A. B. 551; *American Airlines, Inc., Mail Rates*, 6 C. A. B. 567; *United Air Lines, Inc., Mail Rates*, 6 C. A. B. 581. It is revealing to compare the Board's predictions

Any determination of air mail rates for the future is therefore peculiarly "a forecast subject to all the frailties of prophecy." *United Air Lines, Inc.* v. *Civil Aeronautics Board*, 81 App. D. C. 89, 95; 155 F. (2d) 169, 175. When the forecast proves false, revision of the prophecy in light of the actual facts is desirable and, when the rate becomes unreasonably low, constitutionally mandatory.

Congress could, of course, undertake the revision itself. In fact, several times it has adjusted mail rates retrospectively by special legislation. Sometimes private laws have been passed to remedy specific past injustices.[5] At other times general statutes have made retroactive changes in mail rates—both upwards and downwards.[6]

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of these airlines' annual profits (on which it based the 45¢ rate) with the actual profits or losses reported for 1946 and 1947 (*Civil Aeronautics Board, Recurrent Reports of Financial Data*):

	Net Operating Profit Predicted by Board	*Actual Net Operating Profit or Loss*	
		1946	1947
TWA	$3,459,000	$ - 9,675,898	$ - 4,747,098
American	5,997,000	- 318,315	- 4,159,124
United	7,162,000	976,402	- 5,203,699
Eastern	3,754,000	8,221,876	2,859,703

[5] Congress has authorized, by private bill, mail carriers to sue in the Court of Claims to recover compensation to which, for some reason, they had no contractual right. *Kendall* v. *United States*, 12 Pet. [U. S.] 524; *Roberts* v. *United States*, 92 U. S. 41; *Wightman* v. *United States*, 23 C. Cl. 144. Of course the consent to suit could be withdrawn by a later statute, leaving the mail carrier remediless. *Chorpenning* v. *United States*, 94 U. S. 397.

[6] Thus, the Act of July 12, 1876, c. 179 (19 Stat. 79, 82) directed the Postmaster General "to readjust the compensation to be paid from and after the *first* day of July, 1876, for transportation of mails on railroad routes by reducing the compensation to all railroad companies for the transportation of mails ten per centum per annum from the rates fixed and allowed" by a prior act. By its very terms

For example, when Congress established the parcel post system in 1912, it failed to provide for a general increase in mail rates.[7] For years railroads were unable to obtain

this statute was retroactive. It was held inapplicable to certain railroads, on the ground that under their contracts no right had been reserved to change the pay if mail service were continued. *Chicago & Northwestern Ry. Co.* v. *United States*, 104 U. S. 680; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 104 U. S. 687; see *St. Paul & Duluth Rd. Co.* v. *United States*, 112 U. S. 733, 735. As to other railroads, however, the statute was held applicable and given effect. *Jacksonville, Pensacola & Mobile Rd. Co.* v. *United States*, 118 U. S. 626; *Eastern Rd. Co.* v. *United States*, 129 U. S. 391, 395-396; *Wisconsin Central Rd. Co.* v. *United States*, 164 U. S. 190; *cf. Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 198 U. S. 385, 389.

Similarly, the Act of *August* 24, 1912, c. 389, §4 (37 Stat. 539, 554; 39 U. S. C. §574) provided for readjustment of mail pay in certain cases where mail was diverted from a railroad; "readjustment made hereunder shall not take effect before *July* first, nineteen hundred and twelve, and shall be for diversions occurring after *January* first, nineteen hundred and twelve." This statute was applied in *Missouri, Kansas & Texas Ry. Co.* v. *United States*, 256 U. S. 610. Plaintiff was carrying mail under a 1910 contract. Early in 1912 it discontinued a fast train which had been operating when the 1910 contract was made. After the statute was passed, the Postmaster General ordered the mail diverted from plaintiff's line to two other railroads. In 1913 the Postmaster General diminished plaintiff's mail pay, and increased the two other lines' compensation, as of *July* 1, 1912. This Court sustained his order. Mr. Justice Holmes said (p. 614):

> "The statute itself contemplates a readjustment in respect of past services, since it was not approved until August 24, 1912, and allows a readjustment from the first of the previous July. As the change in pay is made in respect of a change that has occurred in the service by which the current pay was fixed, the railroad suffers no injustice, and, as we have said, by the terms of its arrangement it took the risk of such a statute being passed."

[7] The parcel post system was inaugurated effective January 1, 1913. Act of August 24, 1912, c. 389; 37 Stat. 557. At that time mail rates were based on the weight of the mails carried, rather

adequate relief, although some legislation was passed to improve their situation.[8] Finally in 1916 Congress authorized increases in their pay for carrying parcel post, retroactive to stated dates in 1913 and 1914.[9] At the same time—*July* 28, 1916—the Railway Mail Pay Act "authorized and directed" the Postmaster General "to readjust the compensation to be paid to railroad companies from and after the thirtieth day of *June*, nineteen hundred and sixteen, or as soon thereafter as may be practicable" for mail of all kinds "at the rates hereinafter provided."[10]

Likewise, the revision of the Air Mail Act of 1934 in *August* 1935 provided that compensation under existing contracts for carrying air mail "shall be paid at the rate fixed by order of the Commission under this act" from

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than the space occupied. Parcel post weighs relatively less, proportionate to the space occupied, than regular mail. Hence the new system acted to reduce the carriers' compensation. The original act authorized an increase in the compensation of "star routes and screen-wagon contractors" on proof of inadequacy. See 37 Stat. 558; *Halstead* v. *United States*, 55 C. Cl. 317; *Hooton* v. *United States*, 58 C. Cl. 639. No such increase was authorized for railroads; "there was a widespread belief that the railroads were overpaid." *St. Louis Southwestern Ry. Co.* v. *United States*, 262 U. S. 70, 75.

[8] While the Act of March 4, 1913, c. 143 (37 Stat. 797) permitted the Postmaster General to make a limited increase in the railroads' compensation after July 1, 1913, it was purely discretionary. If he failed to exercise his discretion, the railroads were left without remedy. *United States* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 241 U. S. 451; *St. Louis Southwestern Ry. Co.* v. *United States*, 262 U. S. 70, 73.

[9] Act of July 28, 1916, c. 261, §§3 and 4 (39 Stat. 425), quoted *infra*, pp. B10-B11. See *St. Louis Southwestern Ry. Co.* v. *United States*, 262 U. S. 70, 73, footnote 2.

[10] Act of July 28, 1916, c. 261, §5, subdivision 1 (39 Stat. 425), quoted *infra*, p. B11.

"on and after *March* 1, 1935."[11] Decisions under this statute are reviewed *infra*, pp. 53-59.

Adjusting inequitable mail rates by special legislation is, however, a cumbersome and slow process at best. Revision by an administrative agency can be more flexible and less dilatory. Hence Congress created the Board to take over the burden for it in the field of air transportation.

The Act conferred on the Board sufficiently broad power to enable it to cope with all situations that might arise, thus reducing appeals for legislative relief to a minimum.[12] By the unique language of §406(a)(1) of the Act—itself a unique statute—Congress delegated to the Board plenary power to correct its false prophecies by adjusting mail rates retrospectively, without regard to any arbitrary filing date.

By §406(a)(1) the Board is "empowered and directed" to "make such rates effective from such date as it shall determine to be proper." On its face, this language is perfectly clear. Indeed, in 1943 the Board remarked on "the *plain* language of the statute relative to the Board's discretionary power to make rates effective from such date as it deems proper." *American Airlines, Inc. et al., Mail Rates*, 4 C. A. B. 90, 93. Curiously enough, in 1947 it thought that "ambiguity is clearly present" (68).

More comprehensive words than are found in 406(a)(1) would be hard to imagine. As the Board pointed out in

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[11] Act of August 14, 1935, c. 530, §8; 49 Stat. 617, quoted *infra*, pp. B10-B11.

[12] *Cf. United States* v. *New York Central Rd. Co.*, 279 U. S. 73, 79: "Obviously Congress intended the Commission to settle the whole business, not to leave a straggling residuum to look out for itself, with possible danger to the validity of the Act."

one of its first mail rate cases, it is given broad discretion to select any date deemed proper. "The language of section 406(a) gives to the Authority [Board] the right to exercise a sound discretion in determining the proper date on which a rate shall be made effective." *Pan American Airways Co. (of Nevada)—Mail Rates*, 1 C. A. A. 385, 409. No limitation on that discretion is imposed, although of course the Board must regard the statutory objectives. The Board stated this forcefully in *American Airlines, Inc. —Mail Rate Proceeding*, 3 C. A. B. 323, 331:

> "We conclude that section 406(a) of the Act vests in the Board *complete discretion* to determine the date upon which its orders thereunder shall become effective. In exercising this discretion, we are limited *only* by the procedural requirements of notice and hearing and by the necessity of promoting the broad objectives of the Act."[13]

Thus the unwieldy process of petitioning Congress for special legislation to correct past inequities has been obviated. Of course the Board is not compelled to make retrospective changes regardless of circumstances—any more than was Congress. It must, however, after hearing and weighing all the facts of the particular case, select a proper effective date. It can be the day on which its order is issued, or even a future day. Likewise it can be a past day which may or may not antedate the institution of the rate proceeding. Complete pliability is the essence of the statutory scheme in this respect.

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[13] The Board reiterated this conclusion in *American Airlines, Inc. et al. Mail Rates*, 4 C. A. B. 90, 92. The statutory objectives are set forth in Sections 2 and 406(b) of the Act; see pp. 37-39, B1-B2, B12-B13 *infra*.

The sweeping scope of §406(a)(1) is illuminated by its contrast with other parts of the Act dealing with changes in public utility rates for carrying passengers and cargo.

All air carriers must file with the Board "tariffs showing all rates, fares and charges" for passenger and cargo transportation, under §403(a) of the Act, 49 U. S. C. §483(a). The carrier may change these rates, but only prospectively. "No change shall be made in any rate, fare, or charge . . . specified in any effective tariff . . . except *after* thirty days' notice of the proposed change . . . Such notice shall plainly state . . . the time such change *shall* take effect. The Board may in the public interest . . . allow such change upon notice less than that herein specified . . ." §403(c) of the Act, 49 U. S. C. §483 (c). So too the Board may review the filed rates and fix different ones, but only *in futuro*, for §1002(d) of the Act, 49 U. S. C. §642(d), provides:

> "Whenever, after notice and hearing . . . the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier . . . is or will be unjust or unreasonable . . . the Board shall determine and prescribe the lawful rate, fare, or charge . . . *thereafter* to be demanded, charged, collected or received or the lawful classification, rule, regulation or practice *thereafter* to be made effective . . ."[14]

Similarly, §404(a) of the Act, 49 U. S. C. §484(a), requires air carriers to "establish just, reasonable, and

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[14] Manifestly the Board's power under this section is purely prospective. *Cf. Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456, 464.

equitable divisions" of joint passenger and cargo rates "as between air carriers." The Board may "upon complaint or upon its own initiative" investigate "the divisions of joint rates" and "prescribe the just, reasonable, and equitable divisions thereof to be received by the several air carriers." §1002(h), 49 U. S. C. §642(h). That section goes on to say:

> "The Board may require the adjustment of divisions between such air carriers *from the date of filing the complaint* or entry of order of investigation, *or such other date subsequent thereto,* as the Board finds to be just, reasonable and equitable."

Thus when Congress wanted to prevent the Board from taking any retrospective action, it said so. When it wanted to prevent the Board from taking retrospective action back of the date of a proceeding, it said so. It said nothing of the sort in §406(a)(1). Instead it gave the Board full authority to make mail pay rates "effective from such date" —past, present or future—"as it shall determine to be proper." This marked contrast between §406(a)(1) and the other provisions of the Act was completely ignored below.

The opinion below reads into the flexible language of §406(a)(1) a rigid limitation on the Board's power.[15] The Board is to determine "fair and reasonable rates of compensation," and it may make the rate "effective from such date as it shall determine to be proper"—but not if that date is earlier than the filing date of the rate proceeding. A rate may become unfair and unreasonable on one day.

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[15] ". . . we should not write in limitations which Congress did not see fit to make." *Price* v. *Johnston*, 334 U. S. 266, 284.

If the rate proceeding does not start until a month later, however, the Board is held powerless to remedy the past injustice, for it may not make the fair rate effective as of the day when the old one became confiscatory. Full relief may be granted only if, by some lucky coincidence, a rate proceeding happens to be pending on that day for some totally different reason.[16]

For example, on March 1 two airlines may be equally affected by the sudden grounding of airplanes which they both use.[17] If a rate proceeding involving airline X happens to be pending at the time, the Board is free to adjust X's mail rate to allow for the increased costs due to the grounding. If no rate proceeding involving airline Y is pending on March 1, however, the Board is unable to adjust Y's mail rate back to March 1, although Y's need for increased mail pay may be exactly the same as X's. It must stop short at the later date when the rate proceeding involving Y got under way.[18]

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[16] Rate proceedings before the Board generally take from one to four years. See *Civil Aeronautics Board, Report of Formal Economic Proceedings*, March 31, 1948, p. 41, showing one mail rate proceeding which had been pending for over four years, four proceedings pending for over three years, five proceedings pending for over two years, and fifteen proceedings pending for over one year.

[17] In *Braniff Airways, Inc.*, Order No. E-2129, Oct. 28, 1948 the Board pointed out that "costs attributable to the grounding of aircraft types are neither normal nor recurrent in nature," and "are neither predictable nor capable of actual measurement on a prospective basis" (p. 18).

[18] Such a situation has actually developed. On November 1, 1947, all DC-6 airplanes were grounded. *American Aviation Daily*, Nov. 12, 1947, p. 210. Both United Air Lines, Inc. and American Airlines, Inc. were using DC-6 aircraft and receiving the same mail rate. United had a rate proceeding pending; American had none. The DC-6 airplanes were gradually restored to service between March

The Act contains no such arbitrary limitation on the Board's power. It has simply been imported into the statute by main force. This amendment of the statute by judicial fiat is the more unwarranted because it makes it impossible for an airline to obtain full redress when a rate prophecy is mocked by events.

Even when a sudden catastrophe occurs, and rates are bound to be affected, it is not physically possible for an airline to act instantly. The Act requires a petition to be more than a routine piece of paper. The airline must make a conscientious estimate of a fair rate. "Any petition for the fixing of fair and reasonable rates of compensation under this section shall include a statement of the rate the petitioner believes to be fair and reasonable." §406(c), §49 U. S. C. §486(c). If an airline is to comply sincerely with §406(c), it cannot possibly file a petition the moment a disaster occurs. Especially is that true when the calamity is of uncertain duration, such as a strike or the grounding of airplanes, so that one can only speculate whether its effect will pass quickly or persist indefinitely.

The rule adopted below operates just as arbitrarily when the unfairness of a rate develops imperceptibly, as it usually does. "It is impracticable to determine when a rate, reasonable at the time of establishment, will become unreasonable." *Air-Mail Compensation*, 206 I. C. C. 675, 725.

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11 and June 1, 1948. On April 7, 1948, the Board proposed to increase United's rate temporarily back to January 1, 1948. At the same time it instituted a proceeding proposing to increase American's mail rate—but only as of April 7, 1948, since no proceeding was pending before then! See Orders Nos. E-1351 and E-1355, Apr. 7, 1948. The proceedings are still pending, and United may expect to receive compensation reflecting losses arising out of the grounding, but American may not.

It is equally impracticable to detect exactly when a fair rate becomes unfair. Even after unfairness is suspected, the airline may quite reasonably attribute its losses to other causes. No instrument exists which records the precise moment when a fair rate passes into confiscation. With all the advantage of knowledge after the event, the Board's attempt (years later) to fix the day when the rate became unfair will be only an informed guess.

Yet the airline is now told that it must rush to the Board with a petition whenever it remotely suspects that a rate may have become unfair, or risk losing part of its just compensation. It delays at its peril, for the Board will be powerless to grant relief if hindsight shows that the rate was unfair before the petition was filed. Thus a premium is put on hasty, ill-considered petitions, and a penalty is imposed on the airline which files a petition only after events have actually indicated that its fears were well-founded. It is a curious theory indeed which rewards the rash and penalizes the prudent airline.

Actually the Board has repeatedly exercised the power to obviate such untoward consequences which is now disavowed. Until the decision below, it never denied that it had *power* to make mail rates retrospectively effective from any date. The most that it stated was that "as a matter of sound *general* policy there should be no adjustments in mail rates during periods when a rate case is not pending." *Braniff Airways, Inc., Mail Rates for Routes Nos. 9, 15 and 50*, 3 C. A. B. 633, 636.[19] It would be idle to

[19] For other similar "policy" statements, see *Transcontinental & Western Air, Inc., Mail Rates*, 4 C. A. B. 139, 142-143; *All American Aviation, Inc., Mail Rate for Route No. 49*, 4 C. A. B. 354, 356-357; *Pacific Alaska Airways, Inc., Mail Rates*, 6 C. A. B. 61, 70; *Carib-*

talk of a "general" policy if the Board lacked power to vary it.

Moreover, time and again the Board has both asserted and exercised the power to make rates effective as of a time earlier than the start of a rate proceeding. As the cases are rather lengthy and somewhat technical, they are reviewed in detail in Appendix A hereto. When these cases are read with the decision below, it would seem that the Board must regard §406(a)(1) as providing that:

> "The Board is empowered and directed * * * to make such rates effective from such date as it shall determine to be proper, but only if that date does not antedate the date when the Board institutes a proceeding on its own initiative or when the carrier or the Postmaster General files a petition, unless (a) the rate is being established for a new route, or (b) the rate changes a rate previously established by contract only, or (c) the rate changes a previous rate which the Board labelled a 'temporary' or 'tentative' rate, or (d) the Board permits the petition to be filed or amended *nunc pro tunc* some date earlier than its actual filing, or (e) the Board decides to 'reopen' an earlier proceeding and issue an 'amended' or 'revised' order, or (f) the carrier begins a new route and the Board desires (although it is not required) to adjust compensation retrospectively to an earlier date on a 'system' basis, but in that event it may make the adjusted rate retrospective to such earlier date only if it is lower than the previous rate."

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bean-Atlantic Airlines, Inc., Mail Rate, 7 C. A. B. 943, 946. In only two cases did the Board specifically leave open the question whether power existed. *Continental Air Lines, Inc.—Mail Rates for Routes Nos. 29 and 43*, 3 C. A. B. 395, 401; *Mid-Continent Airlines, Inc.—Mail Rates for Routes Nos. 26 and 48*, 3 C. A. B. 464, 466.

This complicated hodgepodge of rarefied and meaningless distinctions is now offered as what Congress is supposed to have intended by the simple, clear words of 406(a)(1). It is little wonder that, when the Board's Public Counsel originally moved to dismiss TWA's petition, they did *not* claim that the Board had no power to grant it. Indeed, as late as April 18, 1947, Public Counsel asserted:

> "*Although the Board has the power to fix a rate to be effective prior to the date of the institution of a mail rate proceeding*, it has consistently held as a matter of sound general policy that no adjustments should be made in mail rates during periods when rate proceedings are not pending."[20]

The clear, express words of §406(a)(1) show that the "Board has the power to fix a rate to be effective prior to the date of the institution of a mail rate proceeding." The Act means just what it says.

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[20] Motion of Public Counsel Burt and Redding to dismiss petition for a retrospective rate, *Matter of Mail Compensation of Pennsylvania-Central Airlines Corp.*, Docket No. 484. As the cases cited in Appendix A show, the Board has not "consistently held" even to the "general policy" to which Public Counsel referred.

Public Counsel's original motion in the present case argued only the propriety of the requested increase (13-21). TWA's answer cited familiar authorities showing that the Board could not abdicate its power by denying a hearing on the merits (22-25). Then, two months after the original motion, Public Counsel amended the motion so as to contend that no such power existed (38). The claim of lack of power was a sheer afterthought.

POINT II

The Court of Appeals relied on an inapplicable presumption against a retrospective interpretation.

The Court of Appeals admitted that the Act uses language which could aptly confer power to make retrospective changes in rates.[21] To pare it down, it resorted to a series of false analogies.

"In the first place," said the Court, "we are met with the almost conclusive presumption against power to take retroactive action unless Congress plainly specifies such power" (112). If there were any such "presumption," the language of §406(a)(1) would be more than ample to rebut it. But, as the Court's citation of *Neild* v. *District of Columbia*, 71 App. D. C. 306, 110 F. (2d) 246, shows, it completely misapplied the familiar principle that "unless the contrary plainly appears a statute applies prospectively only." 110 F. (2d), at p. 254. Since the Act has been in effect all along, it "applies prospectively only" no matter how it is construed.

"Ordinarily, statutes establish rules for the future," *Brewster* v. *Gage*, 280 U. S. 327, 337, and, since "the court will presume that the lawmaking power is acting for the future only and not for the past," *White* v. *United States*, 191 U. S. 545, 552, "laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared," *Shwab* v. *Doyle*, 258 U. S. 529, 534. That is all the presumption against retroactivity means.

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[21] "The language of the disputed clause is not necessarily retroactive. It is as apt in reference to the future as it is to the past" (113).

The presumption has no application to judicial or administrative action taken pursuant to a statute after its passage. To be sure, in certain respects the meaning of a statute may not become known until after it has been judicially construed. In that sense, every case of first impression interpreting a statute necessarily has some retrospective effect, since it determines what the statute meant as well as what it means. Manifestly, however, the presumption against a retroactive interpretation has no relation whatever to the unavoidable fact that often the meaning of a law is not known until it is judicially declared later. *Securities & Exchange Comm.* v. *Chenery Corp.*, 332 U. S. 194, 203-204. Rather the presumption is intended to insure that the legal effect of acts will be determined ordinarily by the statutes then in existence (whenever judicially construed) instead of by later legislation.

Hence a statute is not interpreted retroactively when, as here, it operates only on situations coming into existence after its passage. *Mulford* v. *Smith*, 307 U. S. 38, 51; *Wickard* v. *Filburn*, 317 U. S. 111, 133. Indeed, a "statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment." *Reynolds* v. *United States*, 292 U. S. 443, 449.[22] In fact, the *Neild* case so held. 110 F. (2d), at p. 255.

This is not the case of "a new law reaching backwards." *Woods* v. *Stone*, 333 U. S. 472, 477. The Act has been in effect since 1938. This proceeding concerns the fairness of

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[22] See also, *Cox* v. *Hart*, 260 U. S. 427, 435; *Great Northern Ry. Co.* v. *Sutherland*, 273 U. S. 182, 192; *Lewis* v. *Fidelity & Deposit Co. of Maryland*, 292 U. S. 559, 571; *United States* v. *Jacobs*, 306 U. S. 363, 367; *cf. Gryger* v. *Burke*, 334 U. S. 728, 732.

a rate during 1946 and 1947. Throughout the entire period involved in this case, the Act was in force. There can be no "claim of retroactivity" where a statute involves a "recomputation by the state [Board] of taxes [mail pay] under a statute which was existent through the whole period in question." *Illinois Central Rd. Co.* v. *Minnesota*, 309 U. S. 157, 164. "Readjustment under these conditions cannot be said to be retroactive law making." *Woods* v. *Stone*, 333 U. S. 472, 478.[23] The "almost conclusive presumption" on which the Court of Appeals relied is non-existent.

POINT III

The Court of Appeals relied on a false analogy to public utility rate statutes.

The Court of Appeals also rested heavily on a supposed analogy to public utility rate statutes. "The whole is cast in the form of the usual public utility rate-determination measure. Such measures are frequently made effective as of the date of the inauguration of the proceedings, but never, so far as we know, for periods prior thereto" (114). Therefore the unique language of 406(a)(1), which is found in no public utility rate statute, was cut down to mean something less than it says.

Even if the Court's assumption—that §406 of the Act is the "usual public utility rate-determination measure"—were correct, its conclusion would not follow. "A restric-

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[23] See also, *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U. S. 129, 135; *Helvering* v. *Reynolds*, 313 U. S. 428, 433. *Cf. United States* v. *New York Central Rd. Co.*, 279 U. S. 73, 79; *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 328.

tive interpretation should not be given a statute merely because Congress has chosen to depart from custom." *United States* v. *Sullivan*, 332 U. S. 689, 693.[24] And there were excellent reasons why Congress did not choose to apply public utility rate principles to airmail pay.

1. Undoubtedly in many respects the Act embodies public utility procedures. The Act is hybrid in origin. Its provisions as to certificates of public convenience and necessity, passenger and cargo rate regulation, disclosure of ownership, interlocking relationships, and so forth, are directly derived from sections of the Interstate Commerce Act, particularly those dealing with motor carriers. But, as will appear shortly, the Act's mail pay provision, §406, has an entirely different parentage and different purposes. The only similarity between the "usual public utility rate-determination measure" and §406 is that both employ the word "rates",[25] and that the agencies used to fix the "rates" are called Boards.

Of course the fact that mail pay is determined by a Board of five men rather than (as in earlier days) by one man, the Postmaster General, is of no significance. It is equally irrelevant that §406 uses the word "rates."

Basically the airline is "entitled to receive reasonable compensation" for carrying the mails, as §401(m) of the Act provides. The "fair and reasonable rates of compensation" which the Board fixes under §406 are only the

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[24] See also, *Shapiro* v. *United States*, 335 U. S. 1, 31, footnote 40.

[25] The Court of Appeals seemed to attach considerable significance to the word. "This is the method ordinarily employed by authorities in regulating the charges of public utilities. The word ordinarily used is 'rates'" (113).

means whereby the end result of "reasonable compensation" is computed.[26] As an airline is not obliged to transport a stated quantity of mail during any given period, its total compensation for that period cannot be fixed in advance. Necessarily the compensation is expressed in terms of a "rate" per unit. Multiplying the number of units carried by the rate gives the total "reasonable compensation." When the facts are known, however, the process works just as easily in reverse. Thus, when the Board adjusts mail pay retrospectively to the date of institution of a proceeding it first hits upon a total figure which it believes will provide reasonable compensation, then divides it by the number of units and (reasoning backwards) arrives at an applicable rate.[27]

It is simply bad logic, moreover, to conclude that the Act takes over in a body all the rules peculiar to public utility rate determination because both public utility charges and mail pay are expressed in terms of "rates." As a matter of fact, it was settled long ago that carrying

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[26] *Cf. United States* v. *Griffin*, 303 U. S. 226, 237: "While the compensation fixed in a railway mail pay order is ordinarily measured by a rate, the ultimate question decided by the Commission is . . . the proper compensation to be paid by the Government to the railroad for services and the use of its property—the *quantum meruit* for carrying the mail."

[27] For instance, in *Chicago & Southern Air Lines*, Order No. E-1825 (July 28, 1948), the Board fixed a per unit rate from and after January 1, 1948, but at the same time awarded the lump sum of $3,139,000 as additional mail pay for the two-year period from January 1, 1946 to December 31, 1947. As an afterthought it added in a footnote: "This amount of mail pay is equal to 20.69 cents per airplane mile flown in scheduled service" (Order, p. 2). Thus was the "rate" determined. For other examples, see *infra* notes 45 and 47.

the mail is not a public utility function. "The company in carrying the mails was not hauling freight, nor was it acting as a common carrier, with corresponding rights and liabilities, but in this respect it was serving as an agency of government." *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 225 U. S. 640, 649.[28] Yet for a century both legislation and judicial opinions have referred to mail pay as being "fixed" by "rates."

Even before railroads were used to carry mails,[29] mail pay was expressed in terms of "rates" or "rates of compensation."[30] In 1845 a statute was passed to insure an "equal and just rate of compensation" for the railroads

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[28] See also, *United States* v. *Hamburg-Amerikanische Packetfahrt Action Gesellschaft*, 212 Fed. 40, 43 (C. C. A. 2); *Bankers' Mutual Casualty Co.* v. *Minneapolis, St. Paul & S. S. M. Ry. Co.*, 117 Fed. 434, 439 (C. C. A. 8); *United Fruit Co.* v. *United States*, 33 F. (2d) 664, 666 (C. C. A. 5); *United States* v. *Atlantic Coast Line R. Co.*, 206 Fed. 190, 194; *Railway Mail Pay*, 269 I. C. C. 357, 362.

[29] Railroads were first designated as "post routes" by the Act of July 7, 1838, c. 171, §2, 5 Stat. 268, 283.

[30] Section 2 of the Act of February 20, 1792, c. 7, 1 Stat. 232, fixed maximum mail pay in terms of the postage rates which were stipulated in §§9 and 10. It authorized the "Postmaster General to enter into contracts, for a term of not exceeding eight years, for extending the line of posts, and to authorize the person or persons, so contracting, to receive, during the continuance of such contract, according to the *rates* by this act established, all the postage which shall arise on letters, newspapers and packets, conveyed by any such post." 1 Stat. 233.

See also §2 of the Act of May 8, 1794, c. 23, 1 Stat. 354, 357; which prescribed that the "*compensation*" received by mail carriers should be "at *rates*" not exceeding the postage on the mail carried; and the Act of May 14, 1836, 5 Stat. 132, which authorized the Postmaster General, "provided the same can be done at the present *rates of compensation*, to extend the term of the existing contracts for the transportation of the mail . . ."

carrying mail.[31] A consolidation of the mail pay statutes in 1872 contained six references to "rates," "rates of compensation" and the like.[32] Many mail pay statutes still on

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[31] See §19 of the Act of March 3, 1845, c. 44, 5 Stat. 732, 738-739:

> "That to insure, as far as may be practicable, *an equal and just rate of compensation*, according to the service performed, among the several railroad companies in the United States, for the transportation of the mail, it shall be the duty of the Postmaster General to arrange and divide the railroad routes . . . into three classes . . . and it shall be lawful for him to contract for conveying the mail with any such railroad company . . . *Provided*, That, for the conveyance of the mail on any railroad of the first class, he shall not pay a higher *rate of compensation* than is now allowed by law . . . [And in case the Postmaster General shall not be able to conclude a contract for carrying the mail on any of such railway routes, at a *compensation* not exceeding the aforesaid *maximum rates, or for what he may deem a reasonable and fair compensation* for the service to be performed, it shall be lawful for him to separate the letter mail from the residue of the mail, and to contract . . . for conveying the letter mail . . . by horse express or otherwise . . .] *And provided further*, That if it shall be found necessary to convey over any railroad route more than two mails daily, it shall be lawful for the Postmaster General to pay such *additional compensation* as he may think just and reasonable, having reference to the services performed and the maximum *rate* of allowance established by this act."

The bracketed portion of the statute survived in paraphrase until quite recent days, the words quoted in italics being retained. See 39 U. S. C. §521, repealed by Act of February 28, 1933, c. 131, §1, 47 Stat. 1349.

[32] Act of June 8, 1872, c. 335, 17 Stat. 283. See §210 ("each railway company shall receive, so far as practicable, a proportionate and just *rate of compensation*, according to the service performed"); §211 ("the Postmaster-General may pay twenty-five per centum in addition to the above *rates*"); §212 (a codification of the statute quoted in brackets *supra* in footnote 31); §214 ("until such price is fixed by law, the Postmaster-General may *fix* the *rate of com-*

the books contain like references.[33] The word "rates" was commonly employed in earlier air mail statutes which were not "public utility rate-determination measures" by any stretch of the imagination.[34] Legislation adjusting mail pay retroactively has been phrased in terms of "rates," and even "rates" to be fixed *in futuro*.[35] Long ago numerous opinions had referred to the "fixing" of "rates" of mail pay.[36]

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pensation"); §257 ("The Postmaster-General shall provide for the carrying of the mail on such route at as low *rate* as possible"); §265 ("The Postmaster-General may allow * * * such additional *compensation* * * * as he may think fit, not exceeding, however, fifty per centum of the said *rates*").

[33] See, *e.g.*, 39 U. S. C. §441 ("The Postmaster General shall not . . . expedite the service under any contract either now existing or hereafter given to a *rate of pay* exceeding 50 per centum upon the contract as originally let"); 39 U. S. C. §448 ("Such payment shall not in any case exceed the *rate of pay* per annum of the contractor or subcontractor"); 39 U. S. C. §450 ("when there is no competition for inland transportation . . . and *the rate of compensation* asked is excessive . . . the Postmaster General may require that the mails be carried as freight or express"); 39 U. S. C. §541a ("the *compensation* for such service to be a *rate* not in excess of the *rate* that would be allowed for similar service by railroad or electric car").

[34] See *infra*, note 64.

[35] Thus, the Railway Mail Pay Act, enacted July 28, 1916, provided for a readjustment of mail compensation back to June 30, 1916, "at the *rates* hereinafter provided." See *supra*, note 10 and *infra*, p. B11. Similarly, the Air Mail Act of 1935, enacted in August 1935, provided that compensation under existing mail contracts "shall be paid at the *rate fixed* by the Commission under this Act" from "on and after March 1, 1935." See *supra*, note 11, and *infra*, p. B11. For other examples, see *supra*, note 6.

[36] See, *e.g.*, *Jacksonville, Pensacola & Mobile Rd. Co.* v. *United States*, 118 U. S. 626, 628 ("After the termination of this contract the petitioner continued to carry the mail as previously, without any notice from the Postmaster-General that the price to be allowed for

Plainly §406 did not take over peculiar public utility principles when it used the word "rates." On the contrary, it was merely employing traditional mail pay language, in vogue long before public utility statutes came into being. In short, it is a gross fallacy to draw any inference from the fact that the word "rates" appears both in this Act and public utility rate legislation.

2. Moreover, the rule—already referred to—that carrying the mail is not a public utility function reflects vital practical differences between mail pay and public utility rates, which are made in this very Act.

As a common carrier of passengers and cargo by air, TWA deals directly with the general public—a large, fluctuating group of travellers and shippers. It collects its charges from each customer individually. Every change in its passenger or freight rates directly hits the pocketbooks of its customers. Retrospective increases of those rates are not practically feasible, any more than a retro-

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the service would be in any respect different, until the 21st March, 1876, when he *fixed the rate of compensation* at a less sum"); *Allman* v. *United States*, 131 U. S. 31, 34 ("These allowances did not exceed 50 per cent of the *rate of compensation fixed* by the contracts as originally let, though they did exceed 50 per cent of the sum named in those contracts"); *Wisconsin Central Rd. Co.* v. *United States*, 164 U. S. 190, 205 ("We agree entirely with the Court of Claims that the terms and conditions imposed on this grant embraced the condition that the mail should be carried at such *rates* as Congress might *fix*"); *Delaware, Lackawanna & Western Rd. Co.* v. *United States*, 249 U. S. 385, 387 ("The *rate* thus *fixed* was paid for two years"); *The Mail Divisor Cases*, 251 U. S. 326, 330 ("The *rates* were *fixed* and reduced in their maxima but that was all that was done with regard to them"); *Grand Trunk Western Ry. Co.* v. *United States*, 252 U. S. 112, 120 ("If the railroad was land-aided, payment of more than eighty per cent. of the full *rates* otherwise provided by law was unauthorized").

spective increase of any other public utility rate is feasible in practice. Once a customer has paid the published tariff, he does not have to concern himself with future changes in it; it would be intolerable to make an individual passenger or shipper pay a higher rate years later, even though strictly he had been charged too little.

Theoretically a court could say that an electric company, for example, was entitled to collect a higher rate from each of ten thousand persons who had already paid their bills, retrospectively to some past day. As a practical matter, the increase could hardly be put into effect, for "consumers of electricity are constantly changing, and . . . additional charges could scarcely be enforced against those who had not enjoyed the lower rate." *Springfield Gas & Elec. Co.* v. *Barker*, 231 Fed. 331, 335. That is the very reason why enforcement of a utility rate which *prima facie* is confiscatorily low can be temporarily enjoined. "If the Supreme Court of the State hereafter shall change the rate, even *nunc pro tunc*, the plaintiffs will have no adequate remedy for what they may have lost before the Court shall have acted." *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 293. See also, *Henderson Water Co.* v. *Corporation Comm. of North Carolina*, 269 U. S. 278, 281.[37]

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[37] Retrospective decreases in public utility rates are sometimes possible. Thus if the utility is permitted *pendente lite* to collect a rate which may turn out to be too high, the individual customer may be protected against an overcharge by requiring the utility to post a bond, *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43, 51; *Federal Power Comm.* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 598, or by impounding part of the amounts collected, *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165. See also *Oklahoma Natural Gas Company* v. *Oklahoma*, 258 U. S. 234, 239. There is no way to give the utility comparable relief retrospectively when the rate charged turns out to be too low. Hence a few statutes have per-

Because of these practical considerations, public utility rates look to the future. The Act recognizes that fact. As already seen (pp. 18-19), TWA's public utility rates—its passenger and cargo rates—may be changed only prospectively.

The practical situation is entirely different where mail pay is concerned. As a mail carrier, TWA deals with only one customer—the Government. Compensation for carrying the mail is paid by the Post Office, not by every man who buys an airmail stamp.[38] Changes in mail pay do not directly impinge on any one individual. The Government, as sole customer, never changes its identity; it is always available to bear the cost of retrospective increases, or receive the benefit of retrospective decreases, of mail pay. Retrospective adjustment is practically feasible, and, as noted above (pp. 13-16), has frequently been undertaken.

The difference in treatment was pointed out on May 1,

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mitted temporary reductions in utility rates on condition that, if the temporary rate proves too low, the future final rate shall be high enough to make up the resulting loss. See *Driscoll* v. *Edison Light & Power Co.*, 307 U. S. 104, 114-115; *Beaver Valley Water Co.* v. *Driscoll*, 28 F. Supp. 723; *Staten Island Edison Corp.* v. *Maltbie*, 267 N. Y. App. Div. 72, 45 N. Y. S. (2d) 337, affd. 292 N. Y. 611, 55 N. E. (2d) 376.

[38] Moreover, no attempt is now made to compute airmail pay on the basis of anticipated airmail postage revenue. Under the Air Mail Act of 1934, the Interstate Commerce Commission was directed to "keep the aggregate cost of the transportation of air mail on and after July 1, 1938, within the limits of the anticipated postal revenue therefrom." §6(e), 48 Stat. 936, quoted in full *infra*, p. B-3. That provision was deliberately omitted when the Civil Aeronautics Act was passed. In fact, §1108(b) of the Act, 49 U. S. C. §678(b), expressly provided that in proceedings pending when the Act was passed "the rates determined by the Interstate Commerce Commission shall be determined without regard to that portion of section 6(e) of the Air Mail Act approved June 12, 1934" quoted above.

1947, by a member of the Board when testifying before a Senate sub-committee:

> "Mr. Ryan. When we fix passenger and cargo rates, those rates are prospective in their operation. They do not relate back.
>
> "Now, of course you can understand the practical reasons for that. Passengers are scattered all over, and their identity is lost.
>
> "Senator Saltonstall. You have only one mail customer.
>
> "Mr. Ryan. That is right. There is just the Postmaster General, and if he overpays as a result of one of our decisions, he will not pay the following year and even up."[39]

Since the underlying considerations are different, mail pay has never been controlled by public utility analogies. *United States* v. *Griffin*, 303 U. S. 226, 237-238. It is hardly surprising, therefore, that §406(a)(1)—unlike the provi-

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[39] *Hearings before Subcomm. of Senate Comm. on Appropriations, 80th Cong., 1st Sess., on H. R. 2436*, p. 574. See also testimony of Mr. Maclay, Assistant General Counsel of the Board, in *Hearings before Subcomm. of House Comm. on Appropriations, 80th Cong., 1st Sess., on Post Office Approp. Bill, 1948*, p. 221:

> "With respect to the Civil Aeronautics Board, there is never a retroactive rate with respect to shippers of express or anything like that.
>
> "The situation, as you know, is entirely different between mail pay and the rate which you are fixing for members of the public to pay. It is mechanically not feasible to fix a retroactive rate when the members of the public are paying it.
>
> "On the other hand, the Civil Aeronautics Act provides with respect to mail pay that the Board can fix the rates in any way it sees fit, as to time, method, type, or anything."

sions of the Act dealing with public utility rates—does not embody the traditional public utility rule but permits mail pay rates to be changed "effective from such date as" the Board "shall determine to be proper."

3. Indeed, in other respects §406 of the Act departs radically from the "usual public utility rate-determination measure."

"It must not be forgotten that the Civil Aeronautics Act is fashioned to a developmental as well as a regulatory objective. Nowhere is this fact made clearer than in those provisions which set forth the standards for the Board's guidance in the exercise of its air mail rate-making function." *Pan American-Grace Airways, Inc.—Mail Rates*, 3 C. A. B. 550, 563. "Certainly, the declaration of policy contained in section 2 differentiates the Act in many important respects from the usual form of public utility regulatory statutes." *American Export Airlines, Inc.—Certificate of Public Convenience and Necessity*, 2 C. A. B. 16, 30; appeal dismissed *Pan American Airways, Inc.* v. *Civil Aeronautics Board*, 121 F. (2d) 810 (C. C. A. 2).

Under the Act, mail pay is not determined by "public utility" principles. "This Board in exercising its rate-making functions has never and does not now measure the reasonableness of the rate in terms of a fair return upon the so-called 'fair value' of the property used and useful in the public service." *American Airlines, Inc., Mail Rate Proceeding*, 3 C. A. B. 770, 788. Section 406(b) prescribes distinctive standards for determining mail pay: "In determining the rate in each case, the Board shall take into consideration, among other factors . . . the need of each such air carrier for compensation for the transportation of

mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, *to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.*"[40]

"Section 406(b), more than any other passage of the Civil Aeronautics Act, discloses the basic difference between the dual developmental and regulatory objective of this Act and the regulatory objective of the ordinary statute designed for the control of public utility rates." *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 335. The Board's mail pay task differs "fundamentally from that which faces the public regulatory body in the fixing of rates for the transportation of passengers and property or in the fixing of rates for public utility services." *Pan American Airways Co. (of Delaware)—Mail Rates*, 1 C. A. A. 220, 252-253. See too, *Eastern Air Lines, Inc., Mail Rate Proceeding*, 3 C. A. B. 733, 755.

Actually mail compensation is, under the Act, "Government subsidy in the form of mail pay." *Annual Report of the Civil Aeronautics Board* (1947), p. 5. "The use of the mail payments is a statutory device for the accomplishment of national objectives that transcend the interests of the postal service . . . . The 'compensation' which the carrier receives thus becomes compensation not only for carrying the mail but for the building up of a system of air transportation which will serve the nation's commerce and security as well." *American Airlines, Inc., Mail Rate Proceeding*, 3 C. A. B. 323, 335.

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[40] 49 U. S. C. §486(b), quoted in full *infra* pp. B12-B13.

"Thus section 406(b) of the Act departs from the customary rate standards." *American President Lines, Ltd., et al., Petition,* 7 C. A. B. 799, 802, note 9. That was made clear in the Board's very first mail pay case, *Mid-Continent Airlines, Inc., Mail Rates,* 1 C. A. A. 45 (at pp. 54-55):

> "The above factors which the [Board] is directed to take into consideration in fixing and determining fair and reasonable rates under the act, *differ from the tests which,* under the influence of judicial decision during the past 40 years, *have been set up for the guidance of public regulatory bodies in fixing rates for public utilities and common carriers* . . . Sections 2 and 406, as well as other sections of the Civil Aeronautics Act, disclose the clear intent of Congress that the problems of civil aviation require special treatment."

Precisely because "the problems of civil aviation require special treatment," §406(a)(1) of the Act uses special language appearing in no other statute.

Hence it is doubly fallacious to try to define the Board's power to change mail rates retrospectively by analogy to public utility rate cases. That fallacy was riddled by the Board when it rejected an argument that, because a case had held that public utility rates could be reduced only prospectively, it could not reduce mail pay retrospectively. *American Airlines, Inc.—Mail Rate Proceeding,* 3 C. A. B. 323.[41] There the Board said (pp. 330-331):

> "Unlike that case, *the instant proceeding does not involve a relationship between a private shipper and a common carrier.* If it did, then the carrier's argu-

[41] The same argument had been rejected in *Air Mail Compensation,* 222 I. C. C. 602, 603-604.

ment that the Board may "retroactively" increase rates apparently has no force in view of the principle that a private shipper, once having paid a published rate, need not concern himself with subsequently having to pay more. *On the contrary, the Postmaster General, unlike the private shipper, is the medium through which continuous financial support necessary for the carriers to fulfill the purposes of the Act is extended. Our obligation is to see to it that the rates he pays are at all times sufficient to enable the carriers to accomplish and maintain those purposes.* Likewise, our obligation is also to see that the rates do not at any time exceed those which are proper under the statute. We must discharge both obligations."

4. The Court was led to espouse its false analogy to public utility rate cases by the assumption that its only real alternative was to regard mail service as rendered under a "cost-plus" contract in which "the net to the contractor is the same no matter what the quality of the performance may be, and he bears none of the risks of the operation" (114). "We cannot find in this statute any language which indicates that Congress intended to guarantee to every carrier a profit" (114).

No one claims that Congress intended to "guarantee to every carrier a profit"—much less a profit regardless of the "quality of the performance." It had to, and did, guarantee that "reasonable compensation" for carrying mail would be received. The Board can, must and always does review costs.[42] It is ever alert to allow only reasonable

[42] Section 406(b) expressly refers to the carrier's need for compensation to enable it to fulfill the statutory objectives *"under honest, economical, and efficient management."*

costs in the light of operating experience.[43] The bugaboo conjured up by the Court is simply imaginary.

Moreover, the dilemma which the Court posed is nonexistent. Even in the field of Government contracts—and of course carrying airmail is no longer a matter of contract—the alternatives are not between a "public utility" system "where a price per unit is fixed" (113) and a "cost-plus" system in which "the net to the contractor" is fixed (114). As procurement experience during the war shows, many devices are available whereby a unit price is stipulated in advance but later adjusted retrospectively so that it does not result in undue advantage to either party.[44]

The broad, flexible provisions of §406 likewise enable the Board both to stipulate mail rates on a per unit basis in advance of performance, and to rectify past errors in its forecasts on the basis of actual experience. In practice the Board does just that. For instance, it often fixes avowedly "temporary" rates for the future, which it later revises retrospectively after the results of operation are known. At one time, to be sure, it declined to promulgate mail rates on a "tentative basis, subject to change according to future operating results" because that "would, in effect, result in the establishment of a 'cost-plus' system of rate making." *All American Aviation, Inc., Mail Rate for Route No. 49*, 4 C. A. B. 354, 357. But it has long since recognized the fallacy of that argument, and now regularly fixes "tem-

[43] See, *e.g.*, *Caribbean-Atlantic Airlines, Inc., Mail Rate*, 7 C. A. B. 943, 951-953; *Pioneer Air Lines, Inc., Mail Rates*, 8 C. A. B. 175, 185-186; *Braniff Airways, Inc.*, Order No. E-2129, Oct. 28, 1948, pp. 15-16.

[44] See *Lichter v. United States*, 334 U. S. 742, 762-763, 768-772.

porary" rates both for new routes[45] and established routes on which "permanent" rates were previously in effect.[46] After operating results are known, it revises the former rates—retrospectively as well as prospectively—on the basis of audited actual costs and other factors deemed pertinent. Clearly in these situations the Board uses both the so-called "post-audit" method to adjust mail rates for past periods and the "price per unit" or "prophecy" method to fix rates for the future.

Moreover, admittedly the Board is required to review rates back at least to the date when a proceeding was begun. Whenever it does that, necessarily it audits actual costs and actual revenues, and weighs them and all other relevant factors in the light of actual experience. Then, if

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[45] See, *e.g., Essair, Inc., Temporary Mail Rate*, 6 C. A. B. 687, 690-691; *Transcontinental & Western Air, Inc., Transatlantic Mail Rate*, 7 C. A. B. 421, 423; *Pan American Airways, Inc., Transpacific Mail Rate*, 7 C. A. B. 615, 618. Sometimes, indeed, the Board does not even profess to fix a "temporary" rate where new or experimental services are involved, but waits for several years to obtain actual operating results, occasionally making "temporary" payments on account. Usually in such instances it awards lump sum payments for past periods, which of course can be expressed mathematically in terms of "rates." See, *e.g., Pan-American Airways, Inc.—Transatlantic Rates*, 8 C. A. B. 267 (June 9, 1947), awarding $1,484,000 for the year 1945; *Pioneer Air Lines—Mail Rates*, 8 C. A. B. 175 (July 2, 1947), awarding $505,420 for mail service on a new feeder line from August 1, 1945, to August 31, 1946; *Pan American Airways, Inc.—Latin-American and Miami-Leopoldville Mail Rates*, Orders Nos. E-738 and E-739 (July 24, 1947), awarding approximately $4,500,000 for services from January 1, 1944, to August 31, 1945. In each of these cases the Board went through the ritual of dividing the lump sum payment by the mileage actually flown to obtain a "rate."

[46] See, *e.g., Pennsylvania-Central Airlines Corp.*, 7 C. A. B. 988, 990; *Chicago & Southern Air Lines, Inc.*, Order No. E-510, p. 7 (May 6, 1947); *National Airlines, Inc.*, Order No. E-1271, pp. 5-6 (March 5, 1948).

its past forecast has proved too low, it is corrected for the past—often for as much as two or three years—and a new rate is set for the future.[47] Here again there coexist in actual practice the two methods of arriving at "reasonable compensation" which the Court thought were mutually exclusive.

Several times the Board itself has pointed out why the "cost-plus" spectre affords no reason to adhere doggedly to a false prophecy when events have proved it wrong. "Although it is not the Board's intention in rate proceedings involving the fixing of mail rates for past periods to determine mail rates merely on a cost-plus basis, it must be recognized that the process of fixing rates for a past period" on a retrospective basis "does assure the air carrier substantial protection against unforeseeable contingencies for which a prospective fair and reasonable rate might well have made inadequate allowance." *Pan American Airways, Inc., Transatlantic Mail Rates*, 8 C. A. B. 267, 291, note 22.[48] Certainly Congress was amply justified in accepting that view, whether the Board now likes it or not.

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[47] See cases cited notes 27, 45 *supra*; *Northeast Airlines, Inc.*, Order No. E-1230 (Feb. 26, 1948) awarding $2,107,578 in increased compensation for the period from May 1, 1945 to April 30, 1947 and setting a new rate for the future.

[48] See also, *Pan American Airways, Inc., Latin-American and Miami-Leopoldville Services Mail Rates*, Order No. E-738, p. 47 (July 24, 1947); *Alaska Airlines, Inc.*, Order No. E-1665, pp. 40-41 (June 4, 1948). "It has been the practice to provide a somewhat lower rate of return for a past period than for a future period in view of the fact that for a past period the probability of error in estimates of operating results is removed and other operating risks have been realized in substantial part." *Braniff Airways, Inc.*, Order No. E-2129, p. 36 (Oct. 28, 1948). See also, *Chicago & Southern Airlines, Inc.*, Order No. E-1885, p. 29 (July 28, 1948); *Delta Air Lines, Inc.*, Order No. E-2130, p. 21 (Oct. 28, 1948).

5. In short, the Court relied on a wholly non-existent dilemma to find an analogy in the practice under public utility rate statutes. That analogy ignores the practical differences between public utility rate statutes and §406 of the Act—differences which explain why the Act carefully distinguishes between the Board's purely prospective power to change passenger and cargo rates and its power to change mail pay rates both retrospectively and prospectively. It ignores the fact that mail pay has never been governed by traditional public utility rate principles, and that §406 deliberately departs from those principles. And it ignores the admonition of *Chicago & Southern Airlines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, where, after noting that all forms of transportation had "common features," this Court warned against exactly the kind of reasoning by false analogy that was indulged in below (333 U. S., at pp. 107-108):

> "But these resemblances must not blind us to the fact that legally as well as literally, air commerce, whether at home or abroad, soared into a different realm than any that had gone before. . . . However useful parallels with older forms of transit may be in adjudicating private rights, *we see no reason why the efforts of the Congress to foster and regulate development of a revolutionary commerce that operates in three dimensions should be judicially circumscribed with analogies taken over from two-dimensional transit.*"

POINT IV

The Act removed whatever restrictions may have existed under earlier mail pay statutes.

The Court thought that §406(a)(1) "appears to have been designed to establish in the Board the same powers which had theretofore existed at the Interstate Commerce Commission in respect to railway mail" and it "had never been claimed that the Interstate Commerce Commission had unfettered retroactive power" (113). It found justification for whittling down the Act in the "limited legislative purpose" which it thought was "apparent from the history" (113).

If §406(a)(1) were merely designed to codify the powers of the Commission over railway mail rates, the question naturally arises why the Act did not simply copy the words of the Railway Mail Pay Act. Actually the novel language of §406(a)(1) removed any limitations on the power to adjust mail pay rates which existed under earlier, restrictive statutes. That it conferred plenary authority in this respect is indicated by the only expression of Congress on the point, which appears in the Conference Report on the final bill:

> "*This section* empowers the Authority [Board] to fix mail rates and sets forth the congressional policy to guide the Authority [Board] in fixing such rates and *enables the Authority* [Board] *to adjust rates so that the policy of Congress may be properly carried out in the case of each carrier or class of carriers according to the needs of the particular case* . . . These provisions appear in the conference agreement as section 406(a), (b) and (c)."[49]

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[49] *H. R. Rep. No. 2635, 75th Cong., 3d Sess.*, June 7, 1938, pp. 71-72. The same report was made to and adopted by the Senate on June 13, 1938. 83 Cong. Rec. 8961-8963. The bill was approved by the President on June 23, 1938.

Yet the decision below holds that even when the "needs of the particular case" require that the Board "adjust rates" retrospectively so that the airline may "properly" carry out "the policy of Congress," the Board is powerless to achieve that result.

A. Mail Pay Prior to the Railway Mail Pay Act of 1916

Prior to the Railway Mail Pay Act, mail was normally transported pursuant to contracts made with private carriers by the Postmaster General under statutory authority.[50] Details of the contracts were largely left to the Postmaster General, but ordinarily the maximum rates which he could pay were prescribed by statute, though of course he was free to contract at lower rates if he could obtain them.[51]

It was settled doctrine that, except for certain land-grant roads,[52] "railroads were not required by law to carry the mails."[53] They were perfectly free, as a matter of law,

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[50] In rare instances a mail carrier was called on to render services entirely beyond those covered by its contract, or after expiration of a contract. In such situations the carrier was entitled to recover reasonable compensation. *Alvord* v. *United States*, 95 U. S. 356, 359; *United States* v. *Utah, Nevada, & California Storage Co.*, 199 U. S. 414, 423-424; *Hunt* v. *United States*, 257 U. S. 125, 128. Reasonable compensation included "a fair profit." *Freund* v. *United States*, 260 U. S. 60, 70.

[51] *The Mail Divisor Cases*, 251 U. S. 326, 330.

[52] Usually land-grant railroads were obliged by the statutes under which the grants were made to transport mail "at such price as Congress may by law direct." Beginning in 1862, some land-grant statutes were enacted providing that "fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service" should be paid for carrying mail, public stores, etc. See *Union Pacific Rd. Co.* v. *United States*, 104 U. S. 662, 665.

[53] *New York, New Haven & Hartford Rd. Co.* v. *United States*, 251 U. S. 123, 125.

to reject the Government's terms and refuse to carry the mail. Carriage of the mails was regarded as a purely voluntary matter of contract.[54] Therefore if a railroad kept carrying mail, it was not entitled to "adequate compensation to be judicially determined"[55] but only what the Government allowed.

As a practical matter, therefore, mail rates were largely fixed by the Postmaster General within the limits set by statute. Either Congress by statute, or the Postmaster General by regulations read into the contracts, took care to reserve the power to change the rates. Of course the railroads were not compelled to keep transporting mail if they did not like the new rates, but if they continued to carry mail they could not recover more than the changed rates no matter how much they protested.[56]

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[54] *Eastern Rd. Co.* v. *United States*, 129 U. S. 391, 395-396; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 198 U. S. 385, 389; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 225 U. S. 640, 650; *United States* v. *New York Central Rd. Co.*, 279 U. S. 73, 78; *United States* v. *Griffin*, 303 U. S. 226, 229, footnote 2. "It may be that any railroad by failing to carry the mails would incur the hostility of those living along its lines and as a consequence suffer serious financial losses; but the fear of such results certainly does not amount to compulsion by the United States and cannot constitute the basis of a justiciable claim against them for taking property." *New York, New Haven & Hartford Rd. Co.* v. *United States*, 251 U. S. 123, 127.

[55] *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 225 U. S. 640, 650.

[56] See, *e.g.*, *Eastern Rd. Co.* v. *United States*, 129 U. S. 391, 395-396; *Chicago Milwaukee & St. Paul Ry. Co.* v. *United States*, 198 U. S. 385, 389; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 225 U. S. 640, 650; *Delaware, Lackawanna & Western Rd. Co.* v. *United States*, 249 U. S. 385, 388; *New York, New Haven & Hartford Rd. Co.* v. *United States*, 251 U.S. 123, 127; *St. Louis Southwestern Ry. Co.* v. *United States*, 262 U. S. 70, 73-75. The rule was otherwise as to certain contracts in which it was concluded,

Thus the pre-1916 system of railroad mail pay was inelastic. The only modicum of flexibility in the structure resulted when Congress finally passed statutes permitting or directing an increase or decrease in compensation or private bills to take care of particular situations. In some instances, as already seen (*supra*, pp. 13-15) both increases and decreases in mail pay were ultimately made by retroactive statutes. Years often went by, however, before remedial legislation was enacted.[57] Since changes affecting the railroads, the principal mail carriers, were relatively infrequent, the inflexibility of the rate structure was not as serious as it would have been in the field of air transportation, which is subject to rapid, unpredictable fluctuations in earnings and expenses. Nonetheless the system produced results which were regarded as inequitable and a certain amount of elasticity was imported into it by the passage of the Railway Mail Pay Act in 1916.

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the right to change the rates was not reserved. *Chicago & Northwestern Ry. Co.* v. *United States*, 104 U. S. 680; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 104 U. S. 687; see *St. Paul & Duluth Rd. Co.* v. *United States*, 112 U. S. 733, 735.

[57] For instance, railway mail pay was originally fixed on a mileage basis. In 1864 railway postal cars were introduced for distribution of mail en route, but no additional compensation was provided. Railroads protested without avail. Only in 1872 did Congress pass a statute permitting the Postmaster General to allow any railroad furnishing postal cars "such additional compensation beyond that now allowed by law, as he may think fit, not exceeding, however, 50 per centum of the said rates." Act of June 8, 1872, c. 335, §265; 17 Stat. 283, 316. See *Railway-Mail Pay*, 56 I. C. C. 1, 5.

The next year the mileage basis of computing mail pay was given up for a weight basis. See *The Mail Divisor Cases*, 251 U. S. 326. The effect on the railroads of this weight basis of fixing compensation when the parcel post system was inaugurated, and the years it took before the railroads obtained relief, have already been noted, *supra*, pp. 14-15.

B. The Railway Mail Pay Act of 1916

"Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business." *Federal Trade Comm.* v. *Bunte Brothers, Inc.*, 312 U. S. 349, 353. This warning is especially pertinent when comparing the Civil Aeronautics Act with the Railway Mail Pay Act of 1916[58] and the Air Mail Acts of 1934 and 1935.[59] Appendix B contains a detailed comparison of the three statutes.

"The Railway Mail Pay Act terminated the system theretofore prevailing of service under voluntary contracts." *United States* v. *Griffin*, 303 U. S. 226, 229. Railroads were compelled to carry mail. Necessarily they were "entitled to receive fair and reasonable compensation." 39 U. S. C. §541.

This compensation was fixed purely on a *quantum meruit* basis. *United States* v. *Griffin*, 303 U. S. 226, 237. [Under the Civil Aeronautics Act, airlines are not paid for transporting mail on any such restrictive basis.] Mail rates were to be fixed by the Commission, after hearing. "At the conclusion of the hearing the Commission shall establish by order a fair, reasonable rate or compensation *to be received*, at such stated times as may be named in the order, for the transportation of mail matter . . ." 39 U. S. C. §551. [No such language appears in the Civil Aeronautics Act.]

Once fixed, the rates were to remain in effect until changed. The Commission was "to fix and determine from time to time the fair and reasonable rates and compensa-

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[58] Act of July 28, 1916, c. 261; 39 Stat. 425 ff.; 39 U. S. C. §§524-579.

[59] Act of June 12, 1934, c. 466; 48 Stat. 933; amended by Act of August 14, 1935, c. 530; 49 Stat. 614.

tion for the transportation of such mail matter by railway common carriers . . . and to publish the same, *and orders so made and published shall continue in force until changed by the Commission after due notice and hearing.*" 39 U. S. C. §542. [The difference between this language and §406(a)(1) of the Civil Aeronautics Act is obvious.] No provision for judicial review existed. The statute permitted only "administrative review by 'reexamination' of an order." *United States* v. *Griffin*, 303 U. S. 226, 231. [The Civil Aeronautics Act contains an express provision for judicial review. §1006, 49 U. S. C. §649.]

After it fixed a rate, the Commission had nothing further to do with it until somebody petitioned it for reexamination. It could not "reexamine" the rate on its own initiative. Reexamination could be applied for only by the Postmaster General or the railroad affected. 39 U. S. C. §553. [The Board is not only "empowered" but "directed" to proceed at all times "upon its own initiative" as well as "upon petition of the Postmaster General or an air carrier." §406(a), 49 U. S. C. §486(a).]

Moreover, a rate order could never be reexamined until it had remained in effect six months. "Either the Postmaster General or any such carrier may at any time *after the lapse of six months from the entry of the order assailed apply for a reexamination* and thereupon substantially similar proceedings shall be had with respect to the rate or rates covered by said application . . ." 39 U. S. C. §553. [No such limitation appears in the Civil Aeronautics Act.] And, of course, the Commission was not authorized to make its rate orders "effective from such date as it shall determine to be proper."

Once the Commission fixed a rate, it had to remain in effect at least six months; no one—the Commission, the rail-

road or the Postmaster General—could change it. In view of its highly restrictive language, it is hardly surprising that it was claimed that no power whatever existed under the Railway Mail Pay Act to increase mail pay retrospectively. Yet this Court held that power to increase the rate retrospectively to the date of the petition for reexamination existed by "reasonable implication," although it was "quite aware that minutiae of expression may be found that show Congress to have been thinking of the future." *United States* v. *New York Central Rd. Co.*, 279 U. S. 73, 79.[60]

No issue existed in the *New York Central* case whether mail pay could be increased as of a date earlier than the application for reexamination, and the Court in passing assumed that it could not.[61] The problem actually arose in the "short-line" case of *Macon, Dublin & Savannah Rd. Co.* v. *United States*, 78 C. Cl. 251.

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[60] "This conclusion was reached despite the fact that the applicable statute contained no express authority, such as is contained in section 406(a) of the Civil Aeronautics Act, to determine the date on which rate orders should become effective." *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 326-327.

[61] See 279 U. S., at p. 78: "We *assume* that while the railroads perform these services and accept pay without protest they get no ground for subsequent complaint. *American Smelting & Refining Co.* v. *United States*, 259 U. S. 75, 78." In the case cited, plaintiff claimed that it was not bound to deliver copper under a contract because the copper could have been requisitioned, and therefore the contract was made under duress. This argument was rejected, the Court pointing out that if plaintiff "had desired to stand upon its legal rights it should have saved the question of the price. It did not do so, but on the contrary so far as appears was willing to contract and was content in the main with what was offered" (259 U. S., at p. 78). Manifestly a mail carrier can no longer save "the question of the price" and is no longer free to decide whether it will be "willing to contract." Indeed, the "price" is no longer a matter of "contract" at all.

Under orders of the Commission, "separately operated" short-line railroads were entitled to higher mail pay rates than other roads. In May *1931* plaintiff and other short-line railroads filed petitions for reexamination on the ground that since July 3, *1930* they had been separately operated, under a construction adopted that day. The Commission made findings in their favor but refused to award "additional compensation for services rendered prior to the filing of their applications with us." *Railway Mail Pay*, 185 I. C. C. 715, 720. Plaintiff then sued in the Court of Claims for the additional pay from July 3, 1930, to May 1931. A demurrer to its complaint was overruled. "Congress reposed in the Commission the primary duty of determining just compensation, not whether by some act on the part of the carrier it was estopped as a matter of law from receiving just compensation in its entirety." 78 C. Cl., at p. 256.[62] Final judgment was later given for plaintiff, 79 C. Cl. 298.

While the case primarily involved the question whether plaintiff was entitled to one previously determined rate rather than another, it shows that even under the Railway Mail Pay Act—despite its severely restrictive language—it was sometimes possible for a railroad to obtain an increase in mail pay retrospectively to a time antedating its petition for reexamination.[63] No court decision has been found holding to the contrary.

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[62] The Court concluded that the period of underpayment without protest was not "so protracted as to establish, affirmatively, with all the other circumstances, including the fact that plaintiff was not free to decline performance, the defense of acquiescence." 78 C. Cl., at p. 258.

[63] The "short-line" cases (although not the *Macon* case by name) were referred to in the hearings on the predecessor bill of the Civil

C. The Air Mail Acts of 1934 and 1935

Before 1934, air mail rates were fixed by contracts between the Postmaster General and the airlines, made after competitive bidding.[64] Early in 1934 the contracts were cancelled by a new Postmaster General on the ground that they had been improperly made, and the airlines were un-

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Aeronautics Act: *Hearings before a Subcommittee of Senate Interstate Commerce Committee on S. 2 and S. 1760, 75th Cong., 1st. Sess.*, at pp. 162-163. This document is referred to hereafter as "*Subcommittee Hearings.*"

[64] Prior to 1925 the Post Office transported air mail itself. See *Air Mail Compensation*, 206 I. C. C. 675, 727. §4 of the Air Mail Act of February 2, 1925, 43 Stat. 805, authorized the Postmaster General to contract for the transportation of air mail "at a *rate*" not to exceed four-fifths of the revenues derived from air mail. The Act of June 3, 1926, 44 Stat. 692, enabled the Postmaster General to make contracts "at *fixed rates* per pound" not exceeding certain maximum limits. In 1928 the Postmaster General was authorized to make contracts to carry air mail to foreign countries and insular possessions for periods of not more than ten years "and to pay for such service at *fixed rates* per pound or per mile." Act of March 8, 1928, c. 149, 45 Stat. 248.

In 1928, the Air Mail Act of 1925 was amended by adding a new §6, which permitted the Postmaster General to substitute for certain contracts "an air mail route certificate" effective for a period of ten years. "The *rate of compensation* to the holder of such an air mail certificate shall be determined by periodical negotiation between the certificate holder and the Postmaster General, but shall never exceed the *rate of compensation* provided for in the original contract of the air mail route certificate holder." Act of May 17, 1928, c. 603, 45 Stat. 594.

The Watres Act of April 29, 1930, c. 223, 46 Stat. 259, authorized the Postmaster General to award contracts by competitive bidding "at *fixed rates* per mile" not to exceed $1.25 per mile, and to substitute for an air mail contract a "route certificate" under which the holder would have the right "to carry air mail over the route set forth in the certificate or any modification thereof at *rates of compensation to be fixed* from time to time, at least annually, by the Postmaster General," not exceeding the same amount.

der a cloud.[65] This had the effect of furthering the evolution of legislation which has resulted in our present air transportation system.

From the standpoint of rate flexibility, the 1934 statute, passed shortly thereafter, was far more restrictive than the Railway Mail Pay Act on which it was based. Unlike railroads, airlines were not compelled by law to carry mail. They assumed that obligation voluntarily, by making contracts with the Postmaster General. §3(a), 48 Stat. 933-934. The contracts could be terminated, however, "by the contractor at its option upon sixty days' notice." §6(c), 48 Stat. 935. Rates were stipulated in the contracts, which were let by competitive bidding, but were subject to a specified ceiling. §3(a), 48 Stat. 934. Contracts were to be "subject to any *reduction* in the rate of payment therefor." 6(c), 48 Stat. 935.

Although rates were determined by contract, the Interstate Commerce Commission was also directed to fix by order "rates of compensation for the transportation of air mail by airplane and the service connected therewith . . . but not in excess of the rates provided for in this Act . . . and to publish the same, which shall continue in force until changed by the said Commission after due notice and hearing." §6(a), 48 Stat. 935. The limited procedure under the Railway Mail Pay Act, for reexamination only after six months, was taken over bodily by a section making applicable the whole procedure "for the adjustment of rates for carriage of mail by railroads." §6(d), 48 Stat. 935. In addition, a special requirement was imposed that rates be reviewed annually "in order to be as-

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[65] *Pacific Air Transport* v. *United States*, 98 C. Cl. 649, reviewed at length the facts relating to the cancellation.

sured that no unreasonable profit is resulting or accruing." §6(b), 48 Stat. 935.

Thus Congress' whole effort was to keep air mail pay as low as possible.[66] The act was not interpreted as empowering the Commission to increase rates. Indeed, it took extremely elaborate reasoning to establish that the Commission had any power whatever under the 1934 Act even to *find* that a rate should be higher than that stated in the contract. *Air-Mail Compensation*, 206 I. C. C. 675, 688-694.

In August 1935, however, the statute was radically amended. It was made clear that the Commission could increase as well as decrease the contract rates.[67] Furthermore the *August* amendment provided that contracts in force on March 1, 1935, or let and satisfactorily performed for certain periods thereafter, should be continued indefinitely, "and compensation therefor, on and after *March* 1, 1935, during such period of indefinite continuance, shall be paid at the rate fixed by order of the Commission." 49

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[66] From a consideration of "the amount of air mail so carried, the facilities supplied by the carrier, and its revenue and profits from all sources . . . and other material elements" the Commission was to fix rates for each route "designed to keep the aggregate cost of the transportation of air mail on and after July 1, 1938, within the limits of the anticipated postal revenue therefrom." §6(e), 48 Stat. 936. This provision was amended in 1935 to require the Commission to disregard losses resulting from the unprofitable maintenance of non-mail schedules. 49 Stat. 616.

[67] Thus, §6(e) of the statute was amended to provide that if the holder of a contract contended "that the rate of compensation in force for the service involved is insufficient, the burden of establishing such insufficiency and the extent thereof shall be assumed by him." Act of August 14, 1935, 49 Stat. 616. Likewise §6(c) was amended to delete the provision that contracts should be continued "subject to any reduction in the rate of payment therefor." 49 Stat. 617.

Stat. 617. "This was clearly a retroactive application of rates, which goes much beyond a mere publication of rates as of the date of an application of such subsequent date as the rates brought in issue by the application became unfair and unreasonable." *Air Mail Compensation*, 222 I. C. C. 602, 606.

Before enactment of the 1935 amendment, the Commission had made findings as to the rates for all except two of the domestic routes. After the amendment, air mail pay was adjusted retrospectively back to March 1, 1935, at the rates so fixed.[68] Rates on the other two domestic routes were not determined until after the amendment. In both instances the Commission fixed rates which were higher than the contract rates, effective retrospectively to March 1, 1935, although the proceedings had been begun after that date.[69]

Few cases arose involving requests for readjustment of rates previously fixed by the Commission. It was held that on reexamination rates could be increased not merely prospectively but retrospectively to the date of the application

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[68] See, *e.g.*, *Chicago & Southern Air Lines, Inc., Rate Reviews*, 223 I. C. C. 535, 536; *Air Mail Rates for Route No. 8*, 227 I. C. C. 509, 510; *Air Mail Rate for Route No. 2*, 221 I. C. C. 229, 231.

[69] In *Air Mail Rates for Route No. 31*, 214 I. C. C. 387, the proceeding was begun on March 21, 1935. In *Air Mail Rate for Route No. 33*, 216 I. C. C. 381, the proceeding was begun on July 22, 1935. In the latter case Commissioner Mahaffie (who had not sat in the former case) dissented on the ground that he could "find nothing in the law under which we operate that authorizes us to prescribe compensation retroactively" (p. 403). In 1937 the Post Office was still declining to give any retrospective effect to the Commission's finding. *Inter-Island Airways, Limited, Rate Reviews*, 225 I. C. C. 115, 117.

for reexamination.[70] It was never held that rates could not be adjusted retrospectively to a time antedating the petition for reexamination. In three cases, airlines sought to have rate increases made effective earlier than the time of the application for reexamination. In each case they had a hearing on the merits. The requests were denied on the merits, not for lack of power.[71] The Commission actually

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[70] Here too Commissioner Mahaffie dissented. His argument was that the decision in the *New York Central* case under the Railway Mail Pay Act was inapplicable because airlines—unlike railroads— were not obliged to carry mail. *Air Mail Compensation*, 216 I. C. C. 166, 192. On appeal to the full Commission, this decision was sustained by an 8 to 2 vote, with only Commissioners Mahaffie and Lee dissenting. *Air Mail Compensation*, 222 I. C. C. 602, 610. The Post Office Department never attempted to test the point in the courts (as it had done in the *New York Central* case, by declining to pay on the basis of the Commission's findings), but Commissioner Mahaffie continued to dissent thereafter. *Air Mail Rates for American Airlines, Inc.*, 225 I. C. C. 12, 46; *Air Mail Rates for Braniff Airways, Inc.*, 226 I. C. C. 752, 768; *Air Mail Rates for Route No. 8*, 227 I. C. C. 509, 516; *Air Mail Rates for Route No. 26*, 229 I. C. C. 373, 383; *Air Mail Rates for Route No. 29*, 229 I. C. C. 623, 632; *Air Mail Rates for Route No. 2*, 231 I. C. C. 229, 250; *Air Mail Rates for Route No. 13*, 231 I. C. C. 673, 683.

[71] "As previously stated, petitioner seeks to have the findings herein made effective from May 1, 1936, prior to the date its petition was filed. In *Air-Mail Compensation*, 216 I. C. C. 166, the rates found fair and reasonable for routes nos. 3 and 16 were, for the reasons there stated, made applicable from the date of filing of the petition. *This record affords no basis for any different conclusion*, especially, in view of the fact that the relief sought will, in part at least, be obtained through the proper application of the order in *Air Mail Compensation, supra*, during the period prior to the date of filing the petition." *National Parks Airways—Base Rate Mileage*, 220 I. C. C. 149, 154.

". . . there is no indication *on this record* that any modification of the base rate formerly determined and fixed as fair and reasonable is warranted." *Boston-Maine Airways, Inc., Base Rate Mileage*, 229 I. C. C. 343, 350.

"We find that the rates of compensation for the transportation of air mail by airplane and the service connected therewith over air

made, however, such a retrospective increase in a case involving nearly all the airlines.[72] It also decreased rates

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mail route 6 *have not been shown* to be unfair and unreasonable." *Air Mail Rates for Route No. 6*, 229 I. C. C. 357, 369-370.

[72] An order issued in 1935 in *Air-Mail Compensation*, 206 I. C. C. 675, established a sliding scale of rates for all but two of the domestic routes. As pointed out in *Air Mail Compensation*, 222 I. C. C. 602, 608, it was recognized that this "might result, in some individual instances, in a carrier receiving higher compensation for performing a given number of miles of service than it would have received for performing a greater number of miles, but there then seemed to be little probability of such a result in broad application of the scale. Since that time, however, the inauguration or cessation of partial schedules and changes in route mileages have resulted in such situations with increasing frequency." Consequently, in 1937 the Commission changed its order so as to include a retrospective proviso "to the effect that the compensation payable under any rate determined under the scale should not exceed the minimum compensation payable under the next lower rate so determined." *Air Mail Compensation*, 222 I. C. C. 602, 608. Commissioner Mahaffie dissented. The effect of this proviso was to reduce the compensation considerably. (For details, see the comparative chart in *Air Mail Compensation*, 232 I. C. C. 608, 615.) The Postmaster General regarded the proviso as effective as of March 1, 1935, and required "substantial refunds from the carriers" back to that date. See *Air Mail Compensation*, 232 I. C. C. 608, 610; *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 327 note 12. Thus the compensation was reduced retrospectively.

Later in 1937 the Commission reopened the proceedings as to all airlines, after one had protested. It ultimately vacated the proviso and inserted a new one. "We have authority upon our own motion to correct an error in our former findings and to make such finding in the form of an amendment to our original findings and order." *Air Mail Compensation*, 232 I. C. C. 608, 613. Once again Commissioner Mahaffie dissented. Under the new proviso the airlines received even more than under the original 1935 order. 232 I. C. C., at p. 615. Here again the Postmaster General readjusted compensation back to March 1, 1935. See *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 327 note 12. Thus the increase was also retrospective. During this second readjustment of compensation, it appeared that one of the airlines "had been overpaid

retrospectively to a day antedating the start of the rate review proceeding.[73]

D. The Changes Made by the Civil Aeronautics Act

The Civil Aeronautics Act of 1938 completely revolutionized the status of the airlines and the nature of mail pay. Congress concluded that air carriers subserved national interests of far greater importance than cheap postal service, and that air mail pay should be the means of developing the infant aviation industry to effectuate those interests. Hence Congress enunciated a "new national policy" to foster "the continued development of an air transportation system adequate to the paramount national needs, not only of the postal service but also of our commerce and our national defense." *Chicago & Southern Air Lines, Inc.—Mail Rates for Routes Nos. 8 and 53*, 3 C. A. B. 161, 191.

No longer were airlines free to withdraw from their obligation to carry mail. They were compelled to carry the mails, §§401(k), (m), (n), 49 U. S. C. §§481(k) (m), (n), and §902(a), 49 U. S. C. §622(a). Necessarily they were afforded just compensation as a matter of right, §§401(m) and 406(a).

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during the period from March 1, 1935, to the date of the last order; the Post Office Department collected this excessive compensation by withholding certain sums from current payments until the sum was restored." *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 327 note 12.

[73] See note 72 *supra*. The Commission consistently reviewed operations for periods antedating the proceeding for revision, *e.g.*, *Wyoming Air Service, Inc., Rate Review*, 225 I. C. C. 1; *Western Air Express Corp. Rate Review*, 225 I. C. C. 743; *National Airways, Inc. Rate Review*, 226 I. C. C. 409; *Hanford Airlines, Inc. Rate Review*, 227 I. C. C. 593, but actually lowered its rates only in the instances mentioned in note 72.

Congress abolished the former system under which both the Post Office and the Commission had "authority over the compensation to be paid for the transportation of air mail."[74] Instead a new agency was created to devote its exclusive attention to the subject of air transport and given wide latitude to adjust mail rates.

Provisions designed to hold mail pay as low as possible, so that it would not exceed postal revenue, disappeared.[75] The voluntary contract system—under which airlines would bid nominal rates in order to obtain certificates to operate[76] —was eliminated. Ceilings on maximum rates were removed. Mail pay was no longer to be computed on a narrow *quantum meruit* basis. It was to be ample enough to enable the airlines to "maintain and continue the development of air transportation to the extent and of the character and

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[74] *Subcommittee Hearings*, pp. 40, 42. The Commission had frequently pointed out the undesirable effects of the "divided authority over the compensation to be paid for the transportation of air mail." *50th Annual Report of the Interstate Commerce Commission* (Nov. 1, 1936), p. 31; *51st Annual Report of the Interstate Commerce Commission* (Nov. 1, 1937), p. 39.

[75] The Commission had pointed out the difficulty of determining the postal revenue from air mail (*Statutory Maximum Mail Rates*, H. Doc. No. 141, 75th Cong., 1st Sess., p. 10), that "unless a phenomenal increase occurs in the revenue from air-mail postage by 1938, compensation measured by rates confined to such revenue would not enable the carriers to operate the present class of mail service, if it would permit them to operate at all" (*50th Annual Report of the Interstate Commerce Commission* [Nov. 1, 1936], p. 31), and that there "is, of course, no necessary relation between the reasonable compensation paid for the transportation of the mail and the revenues received by the Government from the public for such service" (*51st Annual Report of the Interstate Commerce Commission* [Nov. 1, 1937], p. 34).

[76] See, *e.g.*, *Transcontinental & Western Air Mail Bid*, 223 I. C. C. 281, involving a bid to carry mail at 1 mill per airplane mile.

quality required for the commerce of the United States, the Postal Service, and the national defense," §406(b). The mail provisions of the Act "enacted the policy of governmental financial aid to the air lines."[77]

Likewise the rate-making procedure under the earlier acts was completely overhauled. Congress struck out the provision that rates should remain in effect until changed. It dropped the requirement that six months had to elapse before mail rates could be "reexamined." The newly-created Board was "empowered" to review rates at all times, §406(a). A petition for a rate had to state the rate believed fair, §406(c).

Nor did Congress leave the development of air transportation to the voluntary action of the airlines. The Board was not to be a passive umpire between the Post Office and the airlines, sitting with folded hands until it was petitioned to act. Congress did *not* allow the Board "to rest upon the assumption that so long as the carrier interposes no objection to an existing rate, the situation requires no particular relief" (87). By §406(a)(1) it not only "empowered" but "directed" the Board to take action "upon its own initiative." It placed on the Board the independent responsibility of effectuating the legislative purposes stated in §2 and §406(b), whether the airline acted or not. "Our *obligation* is to see to it that the rates he [the Postmaster General] pays are *at all times* sufficient to enable the carriers to accomplish and maintain those purposes." *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 330. By the same token, Congress gave the Board full

[77] *Survival in the Air Age*, Report of the President's Air Policy Commission (Jan. 1, 1948), p. 100.

power to effectuate those purposes when the carrier did act.

Thus Congress swept away whatever restrictions existed under earlier laws to hamper the flexible adjustment of mail pay. Limitations on the power to make retrospective rate increases might be appropriate in statutes primarily concerned with keeping the cost of postal operations low. They would only defeat the broad national objectives of the new Act. ". . . when Congress wants to give wide discretion it uses broad language." *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 616. In §406(a)(1) it conferred the widest discretion by using the broadest possible words. The Board was "empowered and directed . . . to make such rates effective from such date as it shall determine to be proper."

E. The "Legislative History" of Section 406(a)(1)

The only valid legislative history of §406(a)(1) appears in the Conference Report issued in June 1938, 16 days before the Act was approved.[78] The "make effective" language had been suggested in the spring of 1937 during hearings on a bill which was not enacted into law.[79] The witness proposing it, Mr. Gorrell, representing the Air Transport Association, told a Senate subcommittee: "the

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[78] See p. 45, *supra*.

[79] Two bills were under primary consideration by the Senate subcommittee, S. 2 and an amendment thereof. (Similar bills were introduced in the House.) Section 311 of the original S. 2, printed in *Subcommittee Hearings*, p. 9, was modified in several respects by the amendment, and §310(d)-(i) of the amendment, printed in *Subcommittee Hearings*, p. 28, conforms much more closely to the present Act. Practically everybody agreed that the amendment was preferable and it was the chief subject of discussion in the hearings. When we refer to the "1938 bill," we shall mean amended S. 2.

present authority of the Commission to fix appropriately the effective date of its rate decisions is . . . specifically preserved."[80] This sentence was relied on by the Board (74-76) and the Court below (113) as the keystone of an argument that Congress intended the Act to be construed to permit rate increases retrospectively only to the filing date of the proceeding. The contention is groundless.

The Board's argument proceeds about as follows. (a) Under the Air Mail Acts of 1934 and 1935, there was a disagreement whether rate changes could be made effective back to the institution of a proceeding. (b) The bill under consideration in 1937 contained provisions "practically identical" with those in the Air Mail Acts. (c) Therefore that disagreement was bound to be perpetuated if that bill was passed. (d) No other disagreement as to the Commission's power existed; the implication is that it was settled that a rate change could not be made effective as of a day antedating the proceeding. (e) Recognizing that this one point of disagreement would persist, and solely to resolve it, Mr. Gorrell suggested the "make effective" language and (f) it was added to the bill for the same limited purpose. (g) Consequently, despite its palpably broader language, it must be given a meaning limited by the narrow disagreement which alone it was designed to resolve. (h) When Congress passed the Act in 1938, over a year later, it had all this past history in mind—although no one referred to it. (i) Therefore the clear words of the Act must be interpreted to mean something less than they say.

This argument is unsound from start to finish.

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[80] *Subcommittee Hearings*, p. 525. See also *Hearings before House Committee on H. R. 5234 and H. R. 4652, 75 Cong., 1st Sess.*, p. 408.

Admittedly there was disagreement within the Commission on the question of retrospective rate-making. Commissioner Mahaffie dissented from every decision changing rates retrospectively. The disagreement was not limited to the narrow question whether the Commission could change rates retrospectively to the date the proceeding was begun, but no earlier. Nor would a disagreement on that narrow question have been perpetuated if the 1937 bill were passed. For it simply is not true that the 1937 bill contained provisions practically identical with those contained in the Air Mail Acts.

For one thing, the rate-making provisions of the 1937 bill were entirely different from those of the Air Mail Acts.[81] All the "minutiae of expression . . . that show

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[81] Section 308(d) of amended S. 2 provided (*Subcommittee Hearings*, p. 28):

"(d) The Commission is empowered and directed, upon its own initiative, or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, and the facilities devoted to and services connected therewith, by each holder of a certificate authorizing the transportation of mail by aircraft; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft: *Provided further*, That the Commission shall as soon as practicable initiate proceedings under this section to fix such rates for air carriers to which payment at the former contract rates is authorized and shall decide all such proceedings as speedily as possible."

The changed standards to be considered in fixing rates were contained in §304(c), *Subcommittee Hearings*, p. 22.

Congress to have been thinking of the future,'"[82] which were carried over bodily into the Air Mail Acts from the Railway Mail Pay Act, were eliminated.[83] More important, the 1937 bill—unlike the Air Mail Acts—obligated airlines to carry mail.[84] Commissioner Mahaffie's disagreement with the majority of the Commission, when it held that power existed under the Air Mail Acts to make rates effective back to the start of proceedings, was wholly predicated on the ground that no obligation to carry mail was imposed by those statutes.[85] The 1937 bill imposed that obligation. Once carriage of mail became the statutory duty of the airlines, no doubt could remain as to the existence of that power in view of this Court's holding in *United States* v. *New York*

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[82] *United States* v. *New York Central Rd. Co.*, 279 U. S. 73, 79.

[83] For instance, rates were no longer to be fixed "by order" which was to "continue in force until changed." More important, the provision permitting "reexamination" of an order only after a 6-months waiting period was eliminated, and the Commission was "directed" to act at all times "upon its own initiative."

[84] See §305(g), *Subcommittee Hearings*, p. 23, and §316(a), *ibid.*, p. 31. For the corresponding provisions of the original S. 2, see §§305(h)(1) and 305(n), *ibid.*, pp. 4 and 5.

[85] In *Air Mail Compensation*, 216 I. C. C. 166, 192, Commissioner Mahaffie, dissenting, stated:

> "For the power to require a retroactive increase in the compensation of the applicant the majority rely greatly on the decision of the Supreme Court in *United States* v. *New York Central*, 279 U. S. 73. That decision was based on the fact that carriage of the mail by railroads is required by law. Refusal is punishable by a fine. Because the service is compelled, the constitutional rights of the railroads were considered of importance. Here we have a very different situation. The air mail is carried by contractors. The air line is under no legal compulsion to become a contractor. It may, on 60 days' notice, terminate its contract, and end its undertaking to carry mail."

Central Rd. Co.—whether or not the "make effective" clause was added. Plainly, therefore, the one point of disagreement on which the Board's argument is focussed would *not* have been perpetuated had the 1937 bill been passed without the "make effective" clause.

But the errors in the basic premise of the Board's argument go even deeper. It is not correct to say that the *only* point of disagreement was whether retrospective changes could be made back to the start of the rate proceeding. Nor is it correct to imply that it was settled, under the Air Mail Acts, that a rate could not be changed retrospectively effective as of any earlier day. No case under the Air Mail Acts ever held or said that.[86] On the contrary, in certain instances where such retrospective changes were deemed appropriate, the Commission actually made them—and those changes also elicited dissents by Commissioner Mahaffie. For instance, he dissented when a contract rate was increased—on the supposed authority of the 1935 amendment—retrospectively back to March 1, 1935, which was months earlier than the start of the rate proceeding.[87] In short, he subscribed to the broad principle that the Commission had no power whatever to make any retrospective rate change. And, as the hearings on the 1937 bill show, it was that entire broad principle which was under consideration

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[86] *Cf.* note 71, *supra.*

[87] See *Air Mail Rate for Route No. 33*, 216 I. C. C. 381, *supra* note 69. Likewise Commissioner Mahaffie dissented in *Air Mail Compensation*, 222 I. C. C. 602, where the Commission amended a 1935 order by a proceeding begun in 1937, so as to insert a proviso which had the effect of reducing rates from 1935, and in *Air Mail Compensation*, 232 I. C. C. 608, where it amended the order again and struck out the proviso. These decisions are digested more fully in note 72, *supra.*

The background of the hearings is illuminating. The major issue at the time was whether air transportation should be regulated by the Post Office, the Interstate Commerce Commission or a new agency devoted solely to aviation. While it was generally agreed that the divided responsibility which existed was undesirable, and that one body should control the industry, there was no agreement on which body. The proponent of the 1937 bill—Senator McCarran—favored a new, independent agency.[88] The President and many other persons favored the Interstate Commerce Commission.[89] In deference to the President's wishes, the 1937 bill would have reposed control in the Commission.[90]

The Post Office Department felt that control over air mail should rest largely with it.[91] Therefore it and its champion, Senator McKellar, vigorously opposed the 1937

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[88] Senator McCarran's very first bill, introduced in 1934, proposed a separate commission. It would have had power under §10(a) "to fix and determine from time to time the fair and reasonable rates and compensation" and under §10(b), "from time to time revise the same in such manner as at all times to return a fair and just compensation to the carrier operating said route or routes and as may be necessary to maintain and insure necessary and adequate transportation of passengers, mail, and property, and all services incident thereto." 78 Cong. Rec. 7617. The bill was objected to on the grounds that a new commission should not be created, and the industry was still too young to have its passenger and freight rates regulated in addition to its mail rates. 78 Cong. Rec. 7623. It was defeated by a 46 to 26 vote in the Senate. 78 Cong. Rec. 7628.

[89] The advisory Federal Aviation Commission created by the 1934 Act recommended creation of an Air Commerce Commission, but the President disagreed. See Sen. Doc. 15, 74th Cong., 1st Sess., p. 39; and the President's message of transmittal, p. iv.

[90] *Subcommittee Hearings*, p. 46.

[91] *Ibid.*, pp. 107 ff.

bill.[92] They proceeded to attack the Commission's administration of the existing statutes on a broad front. The attack was designed to show that the Commission should not be entrusted with control over air mail. Charges and counter-charges of all sorts were made.[93]

During the course of the hearings, the views of Commissioner Mahaffie—who had held out against all retrospective rate changes—were aired by the Solicitor of the Post Office in response to questions. Senator McKellar brought out that the Commission had established "retroactive" rates.[94] "On what possible theory," he inquired, "or what possible

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[92] Senator McKellar was chairman of the Senate Committee on Post Offices and Post Roads. Some months before the hearings he had castigated the Commission, accusing it of "willful defiance of the Congress." "The Interstate Commerce Commission fixes the rates on air mail. With respect to three companies they not only fixed the rates but they antedated them." 81 Cong. Rec. 629.

[93] For example, the Commission was charged with being too liberal in increasing air mail pay, and too reluctant to reduce it (*Subcommittee Hearings*, pp. 116, 122, 160-161). A list was submitted showing that rates had been raised on most routes, and decreased or left unchanged on relatively few (pp. 129-135). So also, the Commission was charged with not making a proper investigation and audit before increasing rates and not disclosing the evidence on which it based its findings (pp. 163, 172-174), of failing to disclose "upon what basis any of the rates have been fixed" (pp. 168, 171), of employing a man "unduly friendly to the air-mail companies" (p. 167), and of differentiating unduly between the rates given to competing airlines (pp. 169-170).

On the other hand, the Post Office was charged with permitting an unlawful consolidation of two airlines (pp. 112-115) and threatening to withdraw mail schedules if the Commission increased rates (pp. 116-118). At one stage the Solicitor for the Post Office plaintively remarked "We are both defendants" and Senator Truman replied, "We are not prosecuting anybody, Judge; we are trying to get the facts" (p. 118).

[94] *Subcommittee Hearings*, p. 179.

claim of law were retroactive rates established?"[95] The answer elicited the reply that "Commissioner Mahaffie in one case wrote a dissenting opinion holding that the Commission did not have the right to go back and fix rates retroactively, but the majority held that they did have that right, and those rates were fixed retroactively, and are retroactive."[96]

Testimony was elicited that the Commission went back to "different dates. The first date the payments were adjusted was to March 1, 1935, I believe. In the last cases they were fixed back to the filing of the application."[97]

> "Senator McKellar. *In the first one, did they go back further than the application?*
>
> "Mr. Crowley. *Yes, in the first case they went back, I think, to the first day of March 1935.* Of course, I do not want to misquote the Commission, you understand.
>
> "Senator McKellar. Oh, no.
>
> "Mr. Crowley. But I think it went back to the 1st day of March 1935.

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[95] *Ibid.*

[96] *Ibid.* For Commissioner Mahaffie's dissenting opinions, see *Air Mail Rate for Route No. 33*, 216 I. C. C. 381, 402, digested *supra* note 69, and *Air Mail Compensation*, 216 I. C. C. 166, 192, mentioned *supra* note 70.

[97] *Subcommittee Hearings*, p. 179. The Post Office had already submitted a schedule showing that in a proceeding instituted on July 22, 1935, the Commission "increased the bid rate of 19-1/2 to 25 cents per airplane mile retroactively to March 1, 1935." *Ibid.*, p. 130. The proceeding referred to was *Air Mail Rate for Route No. 33*, 216 I. C. C. 381, discussed *supra* note 69, where Commissioner Mahaffie had dissented on the ground that the act did not permit the Commission to fix rates "retroactively." This proceeding was referred to later by Senator McKellar as an example of how the Commission allowed "retroactive rates." *Subcommittee Hearings*, p. 291.

"Senator McKellar. Had the act been passed at that time?

"Mr. Crowley. No.

"Senator McKellar. They went back, even, before the passage of the act?

"Mr. Crowley. Yes, sir.

"Senator McKellar. *Did you protest against the creation of retroactive rates?*

"Mr. Crowley. *Yes, sir.*"[98]

Repeatedly, therefore, Senator McKellar tried to show that the Commission had no "right to make their acts retroactive in fixing rates."[99] And the proponent of the bill, Senator McCarran, countered this broad attack on an equally broad front. He endeavored to show that this court had sustained "retroactive rate decisions."[100] "In other words, that establishes the *principle* of the propriety of a retroactive decision."[101] Testimony was elicited to show that Congress itself had empowered the Commission to fix rates "retroactive from August 1935 to March 1, 1935."[102] Mr. Gorrell discussed at length "the power of the Interstate Commerce Commission to make a retroactive award."[103] He contended vigorously that it existed, and even argued that the Post Office itself had actually acquiesced in a decision in which the rate was increased back to the date when the petition was filed.[104]

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[98] *Subcommittee Hearings*, p. 179.

[99] *Ibid.*, p. 239; see also p. 291.

[100] *Ibid.*, p. 180.

[101] *Ibid.*, p. 343.

[102] *Ibid.*, p. 230.

[103] *Ibid.*, p. 483.

[104] *Ibid.*, pp. 484-485. "There is no provision in the Air Mail Act forbidding a retroactive order" (p. 484). "It is apparent, from

Later Mr. Gorrell proposed the "make effective" clause and said that "the present authority of the Commission to fix *appropriately* the effective date of its rate decisions is likewise specifically preserved."[105] Manifestly his proposal was responsive to the broad question on which Commissioner Mahaffie had consistently differed with the majority of the Commission and which Senator McKellar had raised—did the Commission have *any* authority to change rates retrospectively? The whole debate was over the general "principle of the propriety of a retroactive decision."

There is not the slightest reason to suppose that Mr. Gorrell or anyone else thought that the authority to "make such rates effective from such date as it shall determine to be proper" was to be limited by the date of the start of the rate proceeding. The hearings had already developed the fact that rates had been changed retrospectively back of that date. Nobody had suggested that the Commission then had —or should be given—limited power to set rates retrospectively back to the filing date of a proceeding but no further.[106] Certainly there is nothing to show that even as

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an examination of the Air Mail Act, that Congress intended, first, that the carrier should have fair and reasonable rates at all times and second, that the Commission should have the power to see that such rates were granted" (p. 484). "Moreover, the acquiescence of the Post Office Department, as thus referred to, was entirely just and right because there is *no substantial doubt* but that the Commission is empowered to put a rate order in effect as of the date when the Commission has been formally advised an unjust rate then and there existed" (p. 485).

[105] *Ibid.*, p. 525.

[106] *Cf. American Stevedores, Inc.* v. *Porello*, 330 U. S. 446. There the question was whether a statute permitted suit for personal injuries as well as injury to property. The Representative proposing the bill stated that it "simply allows suits in admiralty to be brought

early as 1937 any member of Congress so interpreted the "make effective" amendment. It was not referred to in either of the 1937 Committee reports,[107] or in the debates in the Senate on the amended bill.[108] "The interpretation of statutes cannot be made to rest upon mute intermediate legislative maneuvers." *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 61.

Moreover, the 1937 bill was not passed. It never even came to a vote. It was greatly recast in 1938, and control

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by owners of vessels whose property has been damaged" and that "where a man's property is damaged, he can bring a suit." He said nothing about suits for personal injuries. This Court disregarded these remarks. "These statements were not, however, answers to questions whether the Act would provide a remedy for injury to the person as well as to property, nor does it appear that the speaker was at the time attentive to such possible distinctions" (pp. 451-452).

[107] Below the Board tried to derive some solace from one sentence in *H. R. Rep. 911, 75th Cong., 1st Sess.*, p. 18: "Rates for the carriage of air mail would be fixed by the Commission in the same *manner* as the Commission now fixes the air-mail rates for all domestic air-mail carriers." Manifestly this generality, which summarized the entire rate-making section, with its specification of the "aircraft-mile, pound-mile, weight, space" and other methods of computing rates, was totally unrelated to the specific problem here at issue.

[108] Describing the 1937 bill, Senator Truman said (81 Cong. Rec. 9202):

> "It follows exactly sections 1 and 2 of the Interstate Commerce Act so far as they can be applied to air transportation. Every feature of the bill is intended to regulate air carriers strictly in the public interest. That part of the bill which refers to air mail treats air mail just as mail on railroads is treated. Section 304(a), 305(f), 305(g), and 305(m), and all of Section 311 are devoted exclusively to the mail, and control and regulation of the mail is left completely in the hands of the Postmaster General."

Plainly this general resume did not even begin to approach the specific language of the "make effective" clause. The Senate never discussed the specific provisions of any part of the air mail sections of the bill.

over air mail was given to a new Authority, rather than to the Commission. There is nothing to show that Congress, when it passed the Act in the summer of 1938, saw in §406(a)(1) those nuances now attributed to Mr. Gorrell when he testified in the spring of 1937. No member of Congress ever referred to his testimony. Congress took the language at its broad face value. See the *Conference Report*, quoted *supra*, p. 45.

Had Congress wished to codify such power as existed under the Railway Mail Pay Act, it had only to copy its rate-making provisions and impose on airlines, like the railroads, the obligation to carry the mails.[109] Instead it changed the words of the earlier acts radically by patently broader language. Had it wanted to limit the Board's power to adjust mail pay retrospectively to the filing date of the rate proceeding, it would hardly have used the sweeping—and what the Board is now pleased to call the "ambiguous"—language of §406(a)(1). All it had to do was to copy the language used in other parts of the Act (*supra*, p. 19). It did nothing of the sort.

"The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained

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[109] That obvious procedure was stressed by Commissioner Eastman when testifying in 1937 (*Subcommittee Hearings*, p. 70):

> ". . . you will find that much of the language is similar to language which is now already in the law with reference to railroads or with reference to motor carriers. That, I think, is a desirable thing, because when language has been interpreted once it is desirable to have it used again, thus avoiding many questions always arising with respect to the employment of new language. But, as I say, these bills follow the usual pattern. At the same time, there are certain important differences between them which I shall mention."

Among the differences mentioned were those between the bills and "the present railway mail pay acts" (p. 74).

processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Gemsco, Inc.* v. *Walling*, 324 U. S. 244, 260. The legislative history of the Act only confirms the fact that §406(a)(1) means just what it says. Congress departed from the wording of earlier, restrictive legislation. Drawing a unique statute, it used in §406(a)(1) unique language of a breadth consonant with its broad purpose to foster the development of commercial aviation "until it reaches such stature in passenger and cargo capacity as to constitute in crisis an adequate logistical air arm of the National Defense Establishment." *Report of the Congressional Aviation Policy Board* (Mar. 1, 1948), p. 5. That language should not be whittled down by a construction which ignores these objectives.

POINT V

The decision below thwarts the basic policies of the Act and defeats the airlines' constitutional right to just compensation.

1. The Court below was largely influenced by the "result which would ensue if the statute were given unlimited retroactive effect" (114). But no one suggests that the Board must examine rates "back to 1938" (81), or that it is required to reexamine determinations of mail compensation based on past *facts* which it has once reviewed. It does have full power to examine its rate *prophecies* in the light of actual facts, developing thereafter, which it has never reviewed.[110]

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[110] As shown by *Commissioner of Internal Revenue* v. *Sunnen*, 333 U. S. 591, 598-602, where parallel problems recur in several years a determination as to one year, based on findings of fact for that

"'No rate order,' the Court argued, 'would be final'" (114). On the contrary, every rate order would be final to the extent that it determined compensation for the period prior to the order. And there is nothing in the Act which demands "finality" in any other sense. Indeed, the Act is concerned not with "finality" but flexibility of rates.

The Act does not talk about "final" rates at all. There is no period during which a future rate necessarily will be "final" in the sense of being certain to remain in effect unchanged. Unlike the situation under the Railway Mail Pay Act, under which a rate cannot be reexamined for six months, there is no period during which the Board's future rates are frozen and incapable of being changed.[111] The Act permits a new rate proceeding to be instituted at any time.

Thus, on March 1 the Board may fix a prospective rate to take effect on March 2. A new proceeding to change that

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year, cannot be reviewed again. It is final for that year. That determination does not operate, however, to preclude a review for later years, even though the questions involved are identical, when different or changed facts are involved; "where the situation is vitally altered between the time of the first judgment and the second, the prior determination is not conclusive" (p. 600).

[111] The inelasticity of the Railway Mail Pay Act may be inconsequential in the well-established, stabilized railroad industry. But it was recognized when the Act was passed that the "air-transport industry is a comparatively new field of endeavor. Its operations are restricted by weather conditions and other factors, and are subject to more violent financial uncertainties than those of transportation enterprises generally. Moreover, changes in operating conditions are frequently required by governmental regulations and the rapid development of the art of air navigation." *Western Air Express Corp. Rate Review*, 225 I. C. C. 743, 753. "At the time of the passage of the Civil Aeronautics Act the financial condition of the air-transport industry can fairly be described as chaotic." *First Annual Report of the Civil Aeronautics Authority* (1939), p. 20. It is not surprising that, in the Act, Congress abandoned any attempt to freeze air mail rates for any period of time.

rate can be begun on March 2. While that proceeding is pending, and until the Board sets a new rate, mail compensation will be paid on the basis of the rate set March 1. Admittedly, however, the Board has power in the new proceeding to fix a different rate retrospectively effective as of March 2. In that event the accounts between the Post Office and the airline must be adjusted back to March 2. The prospective rate fixed on March 1 will never have been "final" in the sense of having been immune from revision for any period of time.[112] Thus the supposed "finality" of a rate can be destroyed by filing a petition the day after its issuance.[113]

Once a future mail rate is fixed, therefore, it is "final" only in the sense that until it is adjusted it governs the action of the airline and the Post Office. Importing inflexible notions of "finality" into the Act would only

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[112] *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 363, recognized that even a public utility rate system can provide for "provisional rates" where "the will to make them provisional" is written into the statute. "The essence of such a system is that under it rates can be 'experimentally laid down and experimentally tried out.' Hutcheson, J., in *Eagle Cotton Oil Co.* v. *Southern Ry. Co.*, 51 F. (2d) 443, 447." "In our opinion, the terms of the Act are notice of the intent of Congress that the carrier's needs be examined from time to time in accordance with the standards prescribed by the Act and that its mail rates be fixed accordingly." *American Airlines, Inc., Mail Rate Proceeding*, 3 C. A. B. 323, 332.

[113] Moreover, the Board can always destroy the "finality" of its future rates by terming them "temporary," as it does time and again. In 1942, the Board proposed that during the war all future rates "should be temporary in character." See *infra* pp. 99-100. As already seen, it frequently establishes avowedly "temporary" rates for years at a time. See *supra* notes 45 and 46, and *infra* note 124. Unless there is some magic in nomenclature, and labels—rather than realities—are to control, it is apparent that the "finality" which the Court below sought is illusory.

frustrate the Congressional policy to afford the Board ample power "to adjust rates so that the policy of Congress may be properly carried out in the case of each carrier . . . according to the needs of the particular case."[114]

2. The Court feared that the power to increase mail rates retrospectively necessarily implied the power to redetermine rates for past periods "when the carrier has made more than an adequate profit" (114). There is nothing to fear in this implication. The decision whether or not rates should be adjusted retrospectively—upward or downward—has been left to the Board to determine upon the facts. Recognition of the existence of the power does not imply that the Board may arbitrarily abuse it. The Board may determine to increase an airline's compensation for a past period when its rates have proven to be unduly low. That result carries out the basic policy of the Act to accord the airline mail pay sufficient to enable it at all times to carry out the statutory objectives. It does not, however, follow that the Board may compel the airline to return mail compensation in excess of the amount sufficient to achieve these objectives when it finds that such an action would not fulfill the Act's purposes.

It is curious to find the Board urging an arbitrary limitation on its power to protect the Government against the effects of an erroneous rate prediction in order to justify its supposed inability to give the airlines relief.[115] The Act was

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[114] See the Conference Report on the Act, *supra* p. 45.

[115] Contrast the claim of the Federal Power Commission that it should have the power to find that certain past public utility rates were too high even though admittedly it had no power to fix those rates. *Federal Power Comm.* v. *Hope Natural Gas Co.*, 320 U. S. 591, 618.

designed to work even-handed justice, not even-handed injustice. There is no reason to deny the Board the power to render full justice to the airlines because it would then be able to accord full justice to the Government. Far from sustaining the limitation for which the Board contends, the argument only emphasizes its unsoundness.

We see no reason to deny that the Board has power, in appropriate cases, to find that excessive amounts have been paid for carrying the mails, however seldom that power may be exercised as a matter of sound discretion. To be sure, there are overwhelming economic and policy considerations which ordinarily make it undesirable to attempt to reduce mail pay retrospectively. It may be most unwise to subject an airline to liability to return money which it has disbursed by a "dividend declaration" (upon which taxes have already been paid by it and its stockholders), or on the faith of which it has entered into a "large commitment" or issued an "offering of securities" or otherwise changed its position (115). These and other considerations have led the Board in the past to decline to exercise any retrospective power over excessive mail rates.[116] But the *power* is not rendered non-existent in all cases because it might be abused in some cases.

Suppose, for instance, that a rate prediction is so hopelessly wide of the mark that an airline earns an unconscionably high profit from its mail pay. Assume, too, that the airline has made no disbursements and undertaken no commitments on the faith of that profit, which remains intact when the rate proceeding is begun. Why should not

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[116] *Pan American-Grace Airways, Inc.—Mail Rates*, 3 C. A. B. 550, 565; *Pan American Airways, Inc., et al., Latin-American Rate Case*, 3 C. A. B. 657, 669; *Eastern Air Lines, Inc., Mail Rate Proceeding*, 3 C. A. B. 733, 743; *American Airlines, Inc., Mail Rate Proceeding*, 3 C. A. B. 770, 776.

the Board have power to determine that the airline received far more than "reasonable compensation"?

The Board itself has asserted the power to determine, retrospectively, that excessive mail profits were received during the pendency of a rate proceeding.[117] Historically the Government was always able to recover past overpayments of mail pay, no matter "how long a time elapsed before the error in making the overpayment was discovered or how long the attempt to recover it was deferred."[118]

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[117] *American Airlines, Inc., Mail Rate Proceeding*, 3 C. A. B. 323. There the Board rejected (pp. 329-330) the argument made by the airline—advanced below by the *Board*—that because occasionally Congress specifically authorizes the recapture of excessive profits, it must be inferred that the Board may not determine that excessive mail pay was received. "Although the act does not in terms provide for repayment of any excess mail pay by the carriers, it does authorize the Board to make the rates it fixes effective from such date as it deems proper." *Annual Report of the Civil Aeronautics Board* (1942), p. 24. Of course no one contends that excessive profits derived from passenger or freight rates could be recaptured; the Act makes it plain that those rates can be changed only prospectively.

[118] *Grand Trunk Western Ry. Co.* v. *United States*, 252 U. S. 112, 121. The theory was that the balances for carrying the mail "although arising under successive quadrennial contracts" were "regarded as running accounts." See also, *United States* v. *Carr*, 132 U. S. 644; *Wisconsin Central Rd. Co.* v. *United States*, 164 U. S. 190. "Payment for transportation of the United States mail . . . by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier." Act of September 18, 1940, c. 722, §322; 54 Stat. 955, 49 U. S. C. §66.

For other examples of the power to reduce mail pay retrospectively, to prevent injustice to the Government, see *supra* notes 6 and 72. Actually the Board itself has exercised that power. See *infra* pp. 90-96.

The Act was not designed to confer on airlines a vested right to retain unconscionable mail profits with impunity. It seems plain that the Board has the power to determine that excessive mail pay was received even if its proceeding does not get under way until after the windfall has occurred.

3. The Board's basic complaint was that "until a petition is filed by the carrier we have no notice that an existing rate is regarded as unsatisfactory, and we thus have no opportunity to take" appropriate action (87). That is no reason for denying the existence of power to take complete remedial action when the situation *is* called to the Board's notice—especially since the Board is directed to act on its own initiative regardless of whether the airline petitions it for relief. And there are compelling constitutional and statutory reasons why §406(a)(1) should not be vitiated by any consideration of supposed administrative convenience.

(a) "Rules of comity or convenience must give way to constitutional rights." *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 293. Section 406(a) was not enacted to serve the Board's convenience. It was essential to save the act from unconstitutionality. As the airlines are compelled to carry the mails, they are entitled to just compensation.

The Board argued that "a rate is constitutionally adequate if it affords a carrier an *opportunity* to earn a fair return" (88).[119] That is true only when the rate is initially set—when it is in the prophecy stage. When it ceases to

[119] The Board relied on public utility cases (69-70). Doubtless, when future public utility rates are framed, there is no constitutional requirement "that the losses of the business in one year shall be restored from future earnings by the device of capitalizing the

be adequate in fact, it ceases to be constitutionally adequate, as is shown by *United States* v. *New York Central Rd. Co.*, 279 U. S. 73. A confiscatory rate is no less confiscatory because, when it was originally set, it was hoped that it would afford adequate compensation.

The Court suggested that an airline has a complete remedy under the Act to obtain the just compensation to which it is entitled. "This right is protected by the privilege accorded carriers to apply at any time for higher rates to compensate for *future* service to the Government."[120] But a procedure which merely affords a higher rate for future services does not remedy the insufficiency of the rate for past periods. And it is simply incorrect to imply that the Act—as construed below—affords the airline complete relief.

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losses and adding them to the rate base." *Federal Power Comm.* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 590. The Constitution does not require that future customers be forced to submit to unreasonably high rates because past rates proved too low, any more than it requires "the company to give up for the benefit of future subscribers any part of its accumulations from past operations. Profits of the past cannot be used to sustain confiscatory rates for the future." *Board of Public Utility Commissioners* v. *New York Telephone Co.*, 271 U. S. 23, 32.

Entirely different, however, is the question whether a past rate should be adjusted retrospectively when it has proved confiscatory. For practical reasons, already noted, it is not feasible to have public utility rates retrospectively increased when experience proves them inadequate. "The Constitution as a continuously operating charter of government does not demand the impossible or the impractical." *Hirabayashi* v. *United States*, 320 U. S. 81, 104; *Yakus* v. *United States*, 321 U. S. 414, 424; *Bowles* v. *Willingham*, 321 U. S. 503, 515. It is entirely practical, however, to make a retrospective increase of air mail rates.

[120] *Capital Airlines, Inc.* v. *Civil Aeronautics Board*, decided by the Court of Appeals for the District of Columbia on December 6, 1948, and not yet officially reported.

For one thing, it is impossible for an airline to know exactly when a rate becomes confiscatory. A confiscatory rate does not cease to be confiscatory, however, because it takes time for the airline affected—or the Board—to appreciate the fact. Moreover, as already seen (p. 21), it would be impossible for an airline to file its petition immediately even if it knew the facts. It is as if Congress had said—you have a cause of action to recover your just compensation, but the statute of limitations cuts off that cause of action the day it comes into being.[121] Hence, under the view of the Act adopted below, there will always be some period of time with respect to which the Board is powerless to grant relief, although the rate was confiscatory in fact.[122] Unless the Board has the power we

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[121] Although the legality of a statute of limitations "is unquestionable if a time reasonable, in view of the subject-matter, be given," *United States* v. *Morena*, 245 U. S. 392, 397; *cf. Anderson National Bank* v. *Luckett*, 321 U. S. 233, 242, 246, a statute of limitations is not constitutional if it bars all or part of a right at once, *Sohn* v. *Watterson*, 17 Wall. [U. S.] 596, 599, or if "the period limited be unreasonably short," *Edwards* v. *Kearzey*, 96 U. S. 595, 603; *Wilson* v. *Iseminger*, 185 U. S. 55, 62-63. "And it by no means follows that a legislature may establish an unreasonable limitation because it may establish a reasonable one." *Burrill* v. *Locomobile Co.*, 258 U. S. 34, 38.

[122] When property is taken for public use, the Government need not pay for it beforehand. See, *e.g.*, *Yearsley* v. *W. A. Ross Construction Co.*, 309 U. S. 18, 21; *Hurley* v. *Kincaid*, 285 U. S. 95, 104. It is necessary, however, that the right to obtain full payment be assured by some procedure "conducted in some fair and just manner, with opportunity to the owners of the property to present evidence as to its value, and to be heard thereon." *United States* v. *Jones*, 109 U. S. 513, 519. The construction adopted below precludes the airline from being heard as to the fair value of its services for the full period that the old rate is claimed to be confiscatory. "But it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard." *Bragg* v. *Weaver*, 251 U. S. 57, 59.

claim, a part of the airlines' constitutional rights is left unprotected. Plainly such an interpretation of the Act should be avoided. *United States* v. *New York Central Rd. Co.*, 279 U. S. 73, 79.

(b) Moreover, the purposes of the Act transcend any considerations of administrative convenience. By §406(a) Congress placed on the Board the duty to proceed "upon its own initiative." Quite correctly the Board has "conceived it to be its *duty* under the act to keep itself constantly informed of the status and development of all United States air carriers and in doing so to determine whether the total revenues received by such carriers were greater or less than the revenues required to enable them under honest, economical, and efficient management to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service and the national defense."[123]

Hence Congress imposed on the Board the "obligation . . . to see to it that the rates" paid by the Postmaster General "are *at all times* sufficient to enable the carriers to accomplish and maintain those purposes." *American Airlines, Inc—Mail Rate Proceeding*, 3 C. A. B. 323, 330. It regarded the fostering of a strong commercial aviation industry as vital to national defense and polity. Mail pay

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[123] *Second Annual Report of the Civil Aeronautics Authority* (1940), p. 6. "The Authority believes that it has a duty under the statute not only to revise air-mail rates where such action is warranted by evidence submitted in formal proceedings instituted by the carrier, but also to act upon its own initiative and itself institute mail-rate proceedings where the facts indicate need for revision." *First Annual Report of the Civil Aeronautics Authority* (1939), p. 22.

was the device employed to enable the airlines to fulfill that purpose.

An airline cannot properly attain the legislative goal when its financial strength has been impaired because events have belied the Board's rate predictions. The Board must be able to accord the full relief needed to make good the impairment. If that relief involves the retrospective adjustment of past rate predictions, the Act confers on the Board full power to effectuate the purposes of Congress. We submit that the result reached below flies in the face of the clear words of the statute.

Conclusion

The order of the Court of Appeals should be reversed and the proceeding remanded to the Board for a hearing on the merits.

Respectfully submitted,

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Dated: New York, N. Y., January 14, 1949.

APPENDIX A

The Board has often fixed rates retrospectively as of a date prior to the institution of a rate proceeding.

In this Appendix we shall review the proceedings in which the Board has recognized or exercised the power to fix rates retrospectively to a date prior to the institution of a rate proceeding.[124]

A. The New Route Cases

Occasionally an airline has begun operating a new route without filing a rate petition. In such cases the Board has gone back of the date when the petition was filed and fixed a mail rate retrospectively, effective as of the time when operations started.[125]

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[124] See notes 19, 20 *supra*. Of course a "temporary" rate is frequently increased retrospectively to a date prior to the institution of the proceeding brought to change the rate. See, *e.g.*, *Northwest Airlines, Inc.*, Order No. E-721, July 29, 1947; *Florida Airways, Inc.*, Order No. E-765, Aug. 19, 1947; *Monarch Air Lines, Inc.*, Order No. E-898, Oct. 20, 1947; *Empire Air Lines, Inc.*, Order No. E-896, Oct. 20, 1947; *Florida Airways, Inc.*, Order No. E-897, Oct. 20, 1947; *Southwest Airways Co.*, Order No. E-899, Oct. 20, 1947; *Chicago & Southern Air Lines, Inc.*, Order No. E-1096, Jan. 5, 1948. In its opinion last adjusting TWA's domestic rates, the Board said it was establishing a "tentative rate," *Transcontinental & Western Air, Inc., Mail Rates*, 6 C. A. B. 595, 602, but the magic word "tentative" or "temporary" did not appear in the order.

[125] *All American Aviation, Inc., Mail Rate for Route No. 49*, 3 C. A. B. 79 (route operated 4 months before proceeding begun); *United Air Lines Transport Corp., Mail Rate for Route No. 57*, 3 C. A. B. 381 (route operated 9 days before proceeding begun); *Pacific Alaska Airways, Inc., et al., Alaska Mail Rates*, 6 C. A. B. 61 (route operated 54 days before proceeding begun); *Caribbean-Atlantic Airlines, Inc. Mail Rates*, 6 C. A. B. 407 (route operated 27 months before proceeding begun); *Pioneer Air Lines, Inc., Mail Rates*, 8 C. A. B. 175 (route operated 20 days before proceeding begun).

The Board tried to justify this result on the ground of necessity. "Obviously when a new operation is commenced the question of mail compensation for that operation from its commencement must be decided" (81-82). Obviously some procedure should exist for affording the airline full compensation. Equally obvious, however, is the fact that such a procedure does exist in new route cases, without conjuring up some special power to set rates prior to the time when a petition is filed. All the airline need do, to obtain "compensation for that operation from its commencement," is to file a petition when it starts operations. Indeed, it can petition for a rate even before it has begun to operate.[126] Thus the attempt to distinguish the new route cases on the ground of supposed necessity is utterly unsound.

The Board noted that new route cases involve "no question of the retroactive revision of a final rate, since no rate at all was in effect for the new routes" (82, footnote 32). Quite recently it recognized that this argument was too broad and held that it made no difference that a rate *was* "in effect for the new route" all along.[127] But apart from

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[126] See, *e.g.*, *Mid-Continent Airlines, Inc.—Mail Rate for Route No. 18*, 2 C. A. B. 392; *Northwest Airlines, Inc.—Mail Rate Proceeding for Route No. 45*, 2 C. A. B. 827; *Trans-Texas Airways*, Order No. E-900 (Oct. 20, 1947); *Colonial Airlines, Inc., Bermuda Services Mail Rates*, Order No. E-1153 (Jan. 26, 1948); *Piedmont Aviation, Inc.*, Order No. E-1277 (Mar. 9, 1948). In fact, a so-called "permanent" rate can be—and has been—fixed even before operations have begun. See, *e.g.*, *Continental Air Lines, Inc.—Mail Rates for Route No. 43*, 1 C.A.A. 182, 189; *Pan American Airways Co. (of Delaware)—Mail Rates*, 1 C. A. A. 220, 258. More recently, only a "temporary" rate has been established when operations have not yet started. See, *e.g.*, *Braniff Airways, Inc.*, Order No. E-966 (Nov. 10, 1947).

[127] In *Alaska Airlines, Inc.*, Order No. E-1885 (Aug. 13, 1948), a carrier was operating star routes prior to 1943, and receiving mail

the fact that the statute does not even talk about "final" rates (*supra*, pp. 75-77), the Act draws no distinction between the Board's *power* to make a rate retrospectively effective when it involves "revision of a final rate" and its *power* to make a rate retrospectively effective when no such revision is involved. In one case, the airline is made whole by retrospectively increasing its rate of compensation from an inadequate amount to a fair one; in the other, the increase is from another inadequate amount—zero—to the same fair rate.

Moreover, the Board has actually undertaken revision of what it is pleased to call "final" rate orders.

B. The "Nunc Pro Tunc" Petition Device

In May 1942 the Armed Forces took over many of the airlines' planes, and severe restrictions on service were imposed. To alleviate the resulting hardship, the Board issued two "general memoranda" to all airlines, which are set forth in full in the supplement to this Appendix. In the first, the Board, calling attention to its "*policy* of not making rates effective prior to the institution of a proceeding" (p. 100, *infra*), suggested that it might institute a new rate proceeding on June 1, 1942, for the benefit of carriers having no proceeding then pending. The second memorandum of June 3, 1942, stated:

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pay under contracts with the Postmaster General. On September 4, 1945, it filed a petition to have the Board fix a higher rate. Later it amended the petition to ask that rates be fixed as of January 1, 1943. By analogy to the "new route" cases, the Board held that it had power to grant such retrospective relief. "The fact that in this case the carrier received some compensation, while in the new route cases there was no compensation, is not determinative of the real issue. The important point is that in neither case was there a previously fixed rate for the required service in accordance with the standards of Section 406" (p. 5).

> "The Board will not initiate new rate proceedings as of June 1, 1942, as was stated in the Board's previous memorandum. Consequently, it will be necessary for any carrier which does not now have a rate proceeding pending but which wishes its rates to be subject to review by the Board for the period beginning June 1, 1942, to file a petition under Section 406 of the Act requesting such review. *The Board will accept any such petition filed within the next two weeks as being dated June 1, 1942, if the carrier concerned so desires.*"

Perhaps the Board thought that in this fashion it could pay lip service to its "policy" while avoiding prejudice to any carrier which had withheld a petition in the hope that the Board would start a proceeding itself. But if the Board lacked *power* to make a rate retrospectively effective as of a date earlier than the filing of a petition, of course it could not acquire it by allowing a petition to be filed *nunc pro tunc* that earlier date. "An order may not be made *nunc pro tunc* which will supply a jurisdictional defect." *Stock* v. *Mann*, 255 N. Y. 100, 103, 174 N. E. 76, 77. That is true no matter how equitable the airline's claim for relief might be.[128] Thus the Board actually invited airlines to file petitions asking for retrospective relief which it now says it was powerless to grant.

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[128] *Credit Co. Ltd.* v. *Arkansas Central Ry. Co.*, 128 U. S. 258, 261; *The Bayonne*, 159 U. S. 687, 692-693; *Gagnon* v. *U. S.*, 193 U. S. 451; *Conboy* v. *First Nat. Bank of Jersey City*, 203 U. S. 141, 145; *Old Nick Williams Co.* v. *United States*, 215 U. S. 541, 544; *Boatmen's Bank* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 2 F. (2d) 972, 973 (C. C. A. 8); *Osborn* v. *United States*, 50 F. (2d) 712, 713 (C. C. A. 4); *United States* v. *Rayburn*, 91 F. (2d) 162, 164 (C. C. A. 8); *In re Richmond Hill Electrical Supply Co., Inc.*, 47 F. (2d) 948, 949; *In re Vasquez*, 50 F. (2d) 271.

In *United Air Lines Transport Corp.—Mail Rate Proceeding*, 3 C. A. B. 289, a petition was filed on December 26, 1941, asking revision of the rate from that date. On December 15, 1941, one of the airline's schedules had been discontinued by the Post Office Department. This caused a reduction in its total mail compensation. In January 1942 the airline asked that its petition be amended so as to request an adjustment of the rate as of December 15, 1941. As the Board did not want the airline's total mail compensation reduced, it allowed the amendment "to avoid such an unintended result," and then adjusted the rate on the route upwards as of December 15 (p. 292). To be sure, the airline's total mail compensation was not "substantially" affected but the fact remains that the Board actually increased the rate as of a date before the petition was actually filed, thus exercising power which it now claims did not exist.

C. Retrospective "Reopening" of "Final" Rate Orders

In one of its earliest rate cases, the Board retrospectively increased a rate, long after it had become "final," without paying even lip service to its "general policy."

In June 1939 certain transatlantic mail rates were established, effective May 20, 1939. *Pan American Airways Co. (of Delaware)—Mail Rates*, 1 C. A. A. 220. The order set excess rates for loads over 1,600 pounds, "provided such trip shall have been completed at least as far as Foynes, Ireland or Lisbon, Portugal" (p. 258). It provided that the airline "shall not be entitled to any payment for any trip which shall not continue at least as far as Foynes, Ireland, or Lisbon, Portugal" (pp. 257, 258). On February 23, 1940, the Board "reopened" the proceeding on its own motion "to determine whether the rate of

compensation being paid . . . for the transportation between the United States and . . . the Azores" was fair "and in case such rate should not be found to be fair and reasonable, to fix and determine the fair and reasonable rate" therefor. *Pan American Airways Co. (of Delaware) —Transatlantic Mail Rates*, 1 C. A. A. 650. It found that the existing rate was unfair. "The fact that the volume of mail between the United States and the Azores is nominal in no way alters the fact that petitioner is entitled to a fair and reasonable rate of compensation for the service rendered in transporting such mails" (p. 652). Thereupon it "amended" its original order to authorize excess rates on mail carried only to the Azores, retrospectively to May 20, 1939—8 months earlier than the reopening of the proceeding (p. 654).

Conversely, in *Pan American Airways, Inc., Latin-American Rate Case*, 3 C. A. B. 657, 6 C. A. B. 85, the Board set a final mail rate of 17.83¢ per airplane mile beginning September 1, 1942. Then the Board discovered it had given the airline too much. By an order of February 28, *1944*, the proceeding was "reopened" and the rate "placed under general review" (6 C. A. B., at p. 92).[129]

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[129] The airline had previously filed a petition to reopen the proceeding. It had been granted on November 25, 1942, but only "with respect to certain limited issues," and the proceeding had not been reopened with respect to the rate in question. The order of February 28, 1944 (Serial No. 2726), recited "that review and possible revision of the rate of compensation effective from and after September 1, 1942 . . . is necessary" and that "review and revision of the rate previously fixed in this proceeding . . . . is not within the scope of the issues now pending before the Board pursuant to its order of November 25, 1942, reopening this proceeding," and expressly ordered that the proceeding be "reopened for the purpose of rehearing, reargument and reconsideration with respect to the rate of compensation to be paid Pan American Airways, Inc. for the transportation of mail by aircraft on the Latin American routes from and after September 1, 1942 . . ."

Then by a later order the Board reduced the rate to 13.32¢ per airplane mile, effective September 1, *1942*.[130]

If the Board has no power to revise rates retrospectively in a new proceeding, manifestly it cannot create that power by the transparent device of calling the new proceeding a "reopening" of the old one, for "the subsequent proceeding was, in effect, a new proceeding which by reason of its character invoked an authority not possessed." *United States* v. *Mayer*, 235 U. S. 55, 70.[131] Hence these decisions necessarily recognized that the Board has power to change a rate retrospectively to a day antedating the proceeding instituted to effect that change.

D. The "System" Cases

1. *Western Air Lines, Inc.—Mail Rate for Routes Nos. 13, 19 and 52*, 4 C. A. B. 441, involved an airline which originally had only two routes, on which "final" rates were in effect before 1941. On *June* 12, 1941 it began mail service over a new route. It received no compensation for carrying mail over that route. In *December* 1941 it petitioned the Board for an order fixing rates for its entire

[130] Below it was sought to sustain this action by reference to §1005(d) of the Act (49 U. S. C. §645(d)), which says: "Except as otherwise provided in this Act, the [Board] is empowered to suspend or modify its orders upon such notice and in such manner as it shall deem proper." Of course, if §1005(d) applied it would equally confer power on the Board in this case retrospectively to "modify" its order fixing TWA's mail pay. But the fact remains that §1005(d) is expressly made subordinate to all other provisions of the Act, including of course §406(a)(1). The Board's power to act retrospectively was necessarily derived from §406(a)(1).

[131] See also, *Delaware, Lackawanna & Western Rd. Co.* v. *Rollstab*, 276 U. S. 1, 4-5; *Realty Acceptance Corp.* v. *Montgomery*, 284 U. S. 547, 549, 552; *In re Metropolitan Trust Co.*, 218 U. S. 312, 320.

system of three routes. Later it moved to withdraw that petition and asked to have a rate fixed only for the new route. The Board denied that motion because it thought the rates "should be considered and determined upon a system basis" and that "the rates of compensation payable to respondent on all of its routes should, in so far as feasible, be subject to review and determination during the period" of operations over the new route (p. 442).

Concluding that "a review of respondent's need for mail compensation subsequent to *June* 12, 1941, is in order" (p. 444), the Board reviewed operations over all three routes from that date. It decided that the "mail compensation already paid respondent" on its two old routes "was adequate to meet all of its need" (p. 444). Because those rates "adequately compensated respondent for the services rendered over its entire system" it felt that "no revision of such rates is necessary," and fixed *no* rate of compensation for the new route for the first year and a half of its operations (p. 445).[132]

Referring to its action in reviewing the fairness of the old rates during the six months before the petition was filed, the Board said (p. 444):

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[132] Similar action was taken where "final" rates were previously in effect for all routes. *Transcontinental & Western Air, Inc., Mail Rates*, 4 C. A. B. 139. Rates were in effect for all of TWA's routes prior to 1941. On *March* 13, 1941, TWA petitioned for a new rate for just one route. On *August* 13, 1941, the Board commenced a proceeding to set new rates for all other routes of TWA, consolidating it with TWA's petition. The Board reviewed the rates on all routes from *March* 13, 1941 as "under the present circumstances the Board deems it necessary to review the operations of petitioner as a whole" (p. 143) but found that no revision was necessary (p. 144).

> "This, it should be emphasized, arises out of the unusual circumstances surrounding this case, where even though no proceeding was pending, a review of respondent's mail compensation was necessitated by the operation of a route for which no rate of mail compensation had been fixed. In the absence of like unusual circumstances the Board will adhere to its policy not to review rates prior to the institution of a proceeding by petition or order."

Actually the new route did not "necessitate" the Board's action at all. The Board is able to fix rates on a "system" or over-all basis, rather than for each route, because "the Act does not *require* the maintenance of the route concept."[133] But the Act does not require the "system" basis of rate-making either. The Board has recognized that "we may fix a rate for a single route if such a review indicates the necessity therefor" (*Transcontinental & Western Air, Inc., Mail Rates*, 4 C. A. B. 139, 143), and has done just that several times.[134] Thus retrospective revision of the previous rates on the old routes

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[133] *Inland Air Lines, Inc.—Mail Rates for Routes Nos. 28 and 35*, 3 C. A. B. 491, 492. See also, *Eastern Air Lines, Inc., Mail Rate Proceedings*, 3 C. A. B. 733, 740; *Pennsylvania-Central Airlines Corp., Mail Rates*, 4 C. A. B. 22, 25.

[134] See, *e.g., Mid-Continent Airlines, Inc.—Mail Rate for Route No. 48*, 2 C. A. B. 392, 393; *Pan American Airways, Inc., Latin-American & Miami Leopoldville Services, Mail Rates*, Order No. E-738, July 24, 1947, p. 12. Indeed, in certain cases the Board regards itself as constitutionally obligated to fix a rate for a "segregated" route rather than the whole system. *Pacific Alaska Airways, Inc., et al., Alaska Mail Rates*, 6 C. A. B. 61, 68.

TWA's transatlantic routes are new routes for which only a "temporary" rate has been set. *Transcontinental & Western Air, Inc., Transatlantic Mail Rate*, 7 C. A. B. 421. Yet the Board concluded below that "TWA's domestic and international operations are separate units for rate-making purposes" (90), and therefore declined to apply the "system" cases to TWA.

in a system is not at all mandatory merely because a new route is begun.

If the Act confers no power to reduce retrospectively the excessive compensation which an airline has been paid for rendering certain service, because the rates of compensation are "final," the Board cannot accomplish that result indirectly when the airline later begins a new route. Yet that is what it did in the *Western* case. Nominally it left the old rates on the system unchanged, and gave the airline nothing for carrying mail over the new route. Realistically, it reduced the compensation on the system retrospectively back of the date of the petition, since the airline received no more mail pay although it rendered more mail service.[135]

The Board argued below that the circumstances in the *Western* case were quite different from those here, and that neither "the grounding of planes" nor "labor difficulties" are "particularly unusual" (82-83, and footnote 33). Of course there is nothing at all unusual about opening a new route. But the argument completely misses the point. Section 406(a)(1) does not give the Board special power where a carrier adds a new route to its system, or where "unusual" circumstances arise. Its language is

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[135] Completely untenable is the suggestion made below that the "system" cases can be supported on the ground that, in fixing the *quantum* of compensation to be paid for carrying mail over a new route, the Board "must take into consideration" the airline's revenue from other sources. The airline must always be paid some compensation for the additional service on that route. *Pan American Airways Co. (of Delaware)—Transatlantic Mail Rates*, 1 C. A. A. 650, 652. The "rate of compensation" can never be less than the reasonable value of that service, based on *quantum meruit* principles. *Pan American Airways Co. (of Delaware)—Mail Rates*, 1 C. A. A. 220, 252. Yet in the *Western* case nothing at all was paid for operating over the new route for over eighteen months.

completely general. Certainly it creates no hierarchy of "unusual" circumstances, drawing fine-spun distinctions between one "unusual" situation and another. If the Board lacks power to make a "retroactive revision of a final rate" on old routes, it cannot usurp that power just because a new route has been inaugurated and it usually likes to set a rate for an entire system.

2. In the *Western* case the old rate was nominally left undisturbed. More recently the Board modified an old rate in terms as well as in fact. A carrier operated two old routes at a rate of 21.61 cents per airplane mile. *Colonial Airlines, Inc., Mail Rate*, 7 C. A. B. 415. On April 15, 1946, it started two new routes. In *December* 1946 it filed a rate petition. The Board fixed a lower temporary rate (20 cents per airplane mile) on *all four* routes, retrospectively to *April* 15, 1946. *Colonial Airlines, Inc.*, 7 C. A. B. 986.[136]

3. Recently the Board struggled to reconcile the decision herein with its holdings in the "system" cases. An airline at first operated only one route, on which a "final" rate was in effect. *Northeast Airlines, Inc., Mail Rate—Route No. 27*, 4 C. A. B. 181, 194. On May 1, 1945, it began a second route. On May 14, 1945, it petitioned for a rate on that new route alone. On *June* 20, 1945, the Board began a proceeding to fix a rate for the "system," and consolidated the proceedings. It reviewed the facts back

[136] Later the Board proposed an increase to 50 cents per airplane mile temporarily, stating that "the permanent rate . . . fixed shall be retroactively effective to *April 15, 1946*." Order No. E-1263 (Mar. 4, 1948), p. 5. Evidently the Board realized belatedly that it was doing precisely what it had held, in this case, it could not do, for shortly thereafter, when it put the increase into effect, it said that the "final rate" would be "retroactive to such date as the Board shall then determine." Order No. E-1340 (Apr. 1, 1948), p. 4.

to May 1, 1945, and fixed the compensation for the system "for the period beginning *May* 1, 1945," at a lump sum, "equal to 29.36 cents per airplane mile flown." *Northeast Airlines, Inc., Mail Rates*, Order No. E-1230 (Feb. 26, 1948), order p. 2. Since that rate did "not provide an *upward* adjustment of mail rates on the old Route No. 27 for the period prior to June 20, 1945, when proceedings were initiated with respect to that route" the case was thought by the Board to present "no problem of retroactivity within the principle of the TWA" case (opinion, pp. 35-36).

The Board's argument in the "system" cases carries hair-splitting to the nth degree. First the Board reads into §406(a)(1) a limitation forbidding rates to be retrospectively revised earlier than the time when the rate proceeding begins. Until that time, rates are conclusively presumed to be frozen at a fair amount. Next it engrafts on the limitation an exception which enables it to unfreeze those rates to effect such a retrospective revision when it wants to fix rates on a "system" basis. Then it reads into that exception another one which permits the revision to be made downward, but not upward. Such mental gymnastics indicate that something is radically wrong with the Board's basic interpretation of the Act.

E. Significance of the Board's Action

The Court below, in referring to this long line of Board decisions making rates effective as of dates prior to the initiation of rate proceedings, said "we do not find those instances indicative of the retroactivity which is necessary to support [TWA's] position here" (115). But the fact remains that the Board has repeatedly made such retrospective rate changes and that the sole source of its authority has been its power "to make such rates effective from

such date as it shall determine to be proper." If that language is sufficient to support the actions set forth above, it certainly authorizes the type of adjustment sought herein.

Until its decision below the Board cautiously but repeatedly exercised the power now disclaimed. This administrative interpretation is added proof that there is nothing "ambiguous" about §406(a)(1). But if the Act mysteriously became ambiguous after ten years, the Board's original and long-standing interpretation would be decisive.

"An agency may not finally decide the limits of its statutory power. That is a judicial function." *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369. Where a statute is ambiguous, however, its interpretation by administrative agencies goes "far to remove doubt as to its meaning if any existed," *First National Bank* v. *Missouri*, 263 U. S. 640, 658, and is always "entitled to great weight." *Boutell* v. *Walling*, 327 U. S. 463, 471.[137] "The practice has peculiar weight when"—as here—"it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315.[138]

We submit that §406(a)(1) is perfectly plain, but if its clear words can be tortured into "ambiguity," the Board's previous interpretation has pointed the proper way to resolve any doubt on that score.

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[137] For applications of this principle in mail pay cases, see *United States* v. *Alabama Great Southern Rd. Co.*, 142 U. S. 615, 621; *Grand Trunk Western Ry. Co.* v. *United States*, 252 U. S. 112, 121; *Ewckenbach Steamship Co.* v. *United States*, 280 U. S. 173, 182.

[138] See also *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 549; *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 275; *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 116.

SUPPLEMENT TO APPENDIX A

Civil Aeronautics Board's Memoranda of May 22 and June 3, 1942

May 22, 1942

Memorandum to the President of Each Domestic Air Carrier:

The Board has been considering what action should be taken by it with respect to the mail rates of air carriers (both those carriers which now have mail rate cases pending and those which do not) in the light of the new service pattern necessary under the recent transfer of planes to the Military. Attached is a statement of general principles designed to provide a basis for action in these circumstances.

The Board feels that the course of mail rate cases will be clarified and expedited if the Board could have in advance such criticism, modification or amplification of these suggestions as the carriers deem warranted or desirable.

Will you, therefore, please transmit twelve copies of any comment of your company to the Board by May 29, 1942. The question of oral presentation of views is reserved for consideration in the light of subsequent developments.

A copy of this memorandum is being sent to all counsel for the carriers.

L. WELCH POGUE
L. Welch Pogue
Chairman

Attachment

Statement of General Principles to Govern Mail Rate Cases in the Light of the New Service Pattern

1. Having in mind the restrictions and changes in operation which will result from the delivery of planes to the Military and the operation of still further planes for the Military under contract, it will be necessary to review the mail rates of all air carriers affected thereby for the purpose of revising them in the light of the change in operations. This necessity for review applies to all air carriers affected by the change whether their rates are presently the subject of a rate proceeding or not.

2. It is desirable that, in so far as possible, for procedural purposes in connection with mail rate cases, the date of the changeover to the new service pattern be regarded as having occurred on the same date for all carriers and that such uniform date be the last day of a month. For this purpose May 31, 1942 is suggested.

3. Because of the uncertainties inherent in the present situation and the period of time which will undoubtedly be required to adjust to the new service pattern, it is not feasible to fix fair and reasonable rates for the future on the information presently available or which will be available until the process of adjustment has been substantially completed. Therefore, all rates effective on and after the date of the changeover to the new service pattern should be temporary in character, and should be subject to review and adjustment as to such period as experience may show the necessity for adjustment after a reasonable period of time. At the same time it is considered desirable in the case of all

carriers who now have rate proceedings pending to fix as rapidly as possible a final rate to be effective for all periods under review up to the date of the changeover to the new service pattern.

4. For the purposes of accomplishing the above objectives, it is proposed in all pending rate cases of carriers affected by the new service pattern, including those in which show cause orders have already been issued, to fix a rate which will be final for all past periods under review down to May 31, 1942, and temporary for the period thereafter. With respect to all carriers who do not now have a rate proceeding pending, it is proposed, in view of the Board's policy of not making rates effective prior to the institution of a proceeding, to issue an order instituting a proceeding to fix and determine the fair and reasonable rates for each such carrier from and after the date of the changeover to the new service pattern. It is the intention that this order will bring into issue the rate presently being paid such carrier and make such rate for the period subsequent to June 1, 1942 subject to review and adjustment after sufficient experience has been accumulated.

5. After sufficient experience has been accumulated under the new service pattern and operations and expenses of the carriers have become somewhat stabilized, it is proposed to issue in all proceedings a show cause order setting forth a tentative final rate, upon the general principles hereinafter set out, for the period beginning on the date of the changeover to the new service pattern. Procedure will then follow in accordance with Rule 11 of the Board's Rules of Practice and a final rate will be fixed for the period then under review.

6. It is contemplated, however, that in any case where the carrier can show financial distress due to the fact that its total revenues, including both non-mail of all kind and mail, furnish it with insufficient income to support its operations, the carrier may apply for adjustment of its temporary rate to afford it relief from such distress prior to the fixing of a final rate for the period.

7. The carriers' expenses should be brought to a level consistent with the scope of the operations which can be expected to result from the combined commercial and military operations. This principle must be qualified, however, by recognizing that: (a) It can not be expected that the carriers will be able to reduce expenses in the full proportion in which their level of operations is reduced; (b) they should maintain such organizations as will enable them to be prepared to deal promptly and efficiently with any new obligations which may be imposed upon them by military requirements; and (c) the carriers will not be able to effect immediate reductions in expenses to the extent which may ultimately be appropriate.

8. Where all operations at a point have been discontinued, the expenses formerly incurred at such point should not be considered in the mail rate unless it appears that the carrier is bound by a non-cancelable contract for such expenses and receives no other reimbursement of such expenses, or unless it appears that certain expenses are necessary for protection or maintenance of facilities at such point. Notice of cancelation of some contracts and "adjustment payments" for cancelation may be necessary.

9. The profit element of mail rates should be fixed without substantial reference to stimulus for development of

commercial revenues and traffic, and should not undertake to compensate the carriers for any lack of profit under the contracts with the Military, but should be fixed to provide an incentive for keeping expenses during the war to a minimum compatible with safe and efficient service.

10. Consideration will be given to the possibility of establishing standards for total operating expenses, or for certain categories of expense, as a criterion of economy of operation.

11. The Board will require such information concerning the carrier's revenues and expenses incident to its operations for the Military as may be necessary to enable the Board to give appropriate consideration to such revenues and expenses in fixing mail rates in these cases.

* * *

Memorandum to the President of Each Domestic Air Carrier:

On May 22, 1942 the Board submitted to you a statement of general principles designed to provide a basis for action in mail rate cases in the light of the new service pattern necessary under the recent transfer of planes to the Military. An opportunity was given the carriers to present written comments to the Board thereon, and comments have now been received from a number of carriers.

In view of the substantial differences of opinion among the carriers expressed in their comments, the Board has decided to withdraw the suggestions contained in its earlier memorandum. In lieu thereof, the Board will follow the procedure outlined hereinafter.

The Board will not initiate new rate proceedings as of June 1, 1942, as was stated in the Board's previous memorandum. Consequently, it will be necessary for any carrier which does not now have a rate proceeding pending but which wishes its rates to be subject to review by the Board for the period beginning June 1, 1942 to file a petition under section 406 of the Act requesting such review. The Board will accept any such petition filed witnin the next two weeks as being dated June 1, 1942 if the carrier concerned so desires. In the event such a petition is filed, the Board, after sufficient experience has been accumulated under the new service pattern and operations and expenses of the carriers have become some what stabilized, will issue in such proceeding a show-cause order setting forth a proposed rate. Procedure will then follow in accordance with Rule 11 of the Board's Rules of Practice and a final rate will be fixed both for the past and future periods.

In all pending rate cases of carriers affected by the new service pattern, including those in which show-cause orders have already been issued, the Board will proceed in accordance with its usual procedure to fix a final rate both for the period prior and subsequent to June 1, 1942. Such final rate will be based primarily upon evidence concerning the past operations of the carrier. It is recognized that the forecasting of the future under existing circumstances is extremely difficult, if not impossible. It is, therefore, assumed that any evidence submitted concerning the future period will deal, so far as possible, with general principles and probable trends except where specific commitments have already been made or specific facts are already determined. The rates fixed in the pending proceedings will be final so far as these proceedings are concerned, and, if

the carrier concerned desires any adjustment in this rate in the future, it will be necessary for it to file a petition in the normal way.

The Board recognizes that in special instances unusually expeditious treatment of rate proceedings will be necessary, and it will do its utmost to provide such treatment in those cases.

A copy of this memorandum is being sent to all counsel for the carriers.

Civil Aeronautics Board

June 3, 1942

APPENDIX B

Relevant Statutory Provisions

Railway Mail Pay Act of 1916
39 Stat. 425, 39 U. S. C. §§ 524-579

Air Mail Acts of 1934 and 1935
48 Stat. 933, 49 Stat. 616

Civil Aeronautics Act of 1938
52 Stat. 973, 49 U. S. C. §§ 401-691

Declaration of Policy

None

None

DECLARATION OF POLICY

Sec. 2 (52 Stat. 980, 49 U. S. C. §402) In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

Railway Mail Pay Act of 1916
39 Stat. 425, 39 U. S. C. §§ 524-579

Air Mail Acts of 1934 and 1935
48 Stat. 933, 49 Stat. 616

Civil Aeronautics Act of 1938
52 Stat. 973, 49 U. S. C. §§ 401-691

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

Carrier's Statutory Duty to Carry Mail

Sec. 5, subd. 27 (39 Stat. 429, 39 U. S. C. 534) [illegible] transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith.

Sec. 5, subd. 33 (39 Stat. 431, 39 U. S. C. 563) It shall be unlawful for any railroad company to refuse to perform mail service at the rates or methods of compensation pro-

Requirement as to Carriage of Mail

Sec. 401(*m*) (52 Stat. 990, 49 U. S. C. 481(*m*)) Whenever so [illegible] carrier shall provide necessary and adequate facilities and service for the transportation of mail, and shall transport mail whenever required by the Postmaster General. Such air carrier shall be entitled to receive reasonable compensation therefor as hereinafter provided.

Application for Abandonment

Sec. 401(*k*) (52 Stat. 990, 49 U. S. C. 481(*k*)) No air carrier shall abandon any route, or part-

Carrier's Statutory Duty to Carry Mail

Sec. 5, subd. 27 (39 Stat. 429, 39 U. S. C. §511) All railway common carriers shall transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith.

Sec. 5, subd. 33 (39 Stat. 431, 39 U. S. C. §563) It shall be unlawful for any railroad company to refuse to perform mail service at the rates or methods of compensation provided by law when required by the Postmaster General to do so, and for such offense shall be fined $1,000. Each day of refusal shall constitute a separate offense.

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safety; and

(f) The encouragement and development of civil aeronautics.

REQUIREMENT AS TO CARRIAGE OF MAIL

Sec. 401(m) (52 Stat. 990, 49 U. S. C. §481(m)) Whenever so carrier shall provide necessary and adequate facilities and service for the transportation of mail, and shall transport mail whenever required by the Postmaster General. Such air carrier shall be entitled to receive reasonable compensation therefor as hereinafter provided.

APPLICATION FOR ABANDONMENT

Sec. 401(k) (52 Stat. 990, 49 U. S. C. §481(k)) No air carrier shall abandon any route, or part thereof, for which a certificate has been issued by the Authority, unless, upon the application of such air carrier, after notice and hearing, the Authority shall find such abandonment to be in the public interest. Any interested person may file with the Authority a protest or memorandum of opposition to or in support of any such abandonment. The Authority may, by regulations or otherwise, authorize such temporary suspension of service as may be in the public interest.

TENDER OF MAIL

Sec. 405(g) (52 Stat. 995, 49 U. S. C. §485(g)) From and after the issuance of any certificate authorizing the transportation of mail by aircraft, the Postmaster General shall tender mail to the holder

thereof, to the extent required by the Postal Service, for transportation between the points named in such certificate for the transportation of mail, and such mail shall be transported by the air carrier holding such certificate in accordance with such rules, regulations, and requirements as may be promulgated by the Postmaster General under this section.

SAFETY AND POSTAL OFFENSES

Sec. 901(a) (52 Stat. 1015, 49 U. S. C. 621 (a)) Any person who violates (1) any provision of titles V, VI, and VII of this Act, or any provision of subsection (a) (1) of section 11 of the Air Commerce Act of 1926, as amended, or (2) any rule or regulation issued by the Postmaster General under this Act, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. Any such penalty may be compromised by the Authority or the Postmaster General, as the case may be. The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to

CRIMINAL PENALTIES—GENERAL

Sec. 902(a) (52 Stat. 1015, 49 U. S. C. §622(a)) Any person who knowingly and willfully violates any provision of this Act (except titles V, VI, and VII), or any order, rule, or regulation issued under any such provision or any term, condition, or limitation of any certificate or permit issued under title IV, for which no penalty is otherwise herein provided, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject for the first offense to a fine of not more than $500, and for any subsequent offense to a fine of not more than $2,000. If such violation is a continuing one, each day of such violation shall constitute a separate offense.

Authorization to Award Mail Contracts

Sec. 5, subd. 10 (39 Stat. 427, 39 U. S. C. §565). The Postmaster General is authorized to make special contracts with the railroad companies for the transportation of the mails where in his judgment the conditions warrant the application of higher rates than those herein specified, and make report to Congress of all cases where such special

Sec. 3(a) (48 Stat. 933) The Postmaster General is authorized to award contracts for the transportation of air mail by airplane between such points as he may designate, and for initial periods of not exceeding one year,* to the lowest

[No authorization to award new contracts except "in the event of emergency caused by flood, fire or other calamitous visitation." Sec. 405(k) (52 Stat. 997, 49 U. S. C. §485(k)).]

* Words "one year" changed to "three years" by amendment of August 14, 1935 (49 Stat. 616).

contracts are made and the terms and reasons therefor.

responsible bidders tendering sufficient guaranty for faithful performance in accordance with the terms of the advertisement at fixed rates per airplane-mile: *Provided,* That where the Postmaster General holds that a low bidder is not responsible or qualified under this Act, such bidder shall have the right to appeal to the Comptroller General who shall speedily determine the issue, and his decision shall be final: *Provided further,* That the base rate of pay which may be bid and accepted in awarding such contracts shall in no case exceed 33-1/3 cents per airplane-mile for transporting a mail load not exceeding three hundred pounds. Payment for transportation shall be at the base rate fixed in the contract for the first three hundred pounds of mail or fraction thereof plus one tenth of such base rate for each additional one hundred pounds of mail or fraction thereof, computed at the end of each calendar month on the basis of the average mail load carried per mile over the route during such month, except that in no case shall payment exceed 40 cents per airplane mile.

Postmaster General to provide and pay for the carriage of mail by air in conformity with the terms of any contract let by him prior to the passage of this Act, or which may be let pursuant to a call for competitive bids therefor issued prior to the passage of this act and to extend any such contract for an additional period or periods not exceeding nine months in the aggregate at a rate of compensation not exceeding that established by this Act

dred pounds of mail or fraction thereof plus one tenth of such base rate for each additional one hundred pounds of mail or fraction thereof, computed at the end of each calendar month on the basis of the average mail load carried per mile over the route during such month, except that in no case shall payment exceed 40 cents per airplane-mile.

Sec. 3(c) (48 Stat. 934) Authorizes Postmaster General to provide and pay for the carriage of mail by air in conformity with the terms of any contract let by him prior to the passage of this Act, or which may be let pursuant to a call for competitive bids therefor issued prior to the passage of this act and to extend any such contract for an additional period or periods not exceeding nine months in the aggregate at a rate of compensation not exceeding that established by this Act nor that provided for in the original contract: *Provided*: that no such contract may be so extended unless the contractor shall agree in writing to comply with all the provisions of this Act during the extended period of the contract.

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Termination of Mail Contracts

None

Sec. 6(c) (48 Stat. 935) Any contract which may hereafter be let or extended pursuant to the provisions of this Act, and which has been satisfactorily performed by the contractor during its initial or extended period, shall thereafter be continued in effect for an indefinite period, subject to any reduction in the rate of payment therefor, and such additional conditions and terms, as the [Interstate Com-

None [Contracts entered into under the Air Mail Act canceled upon the issuance of a certificate of convenience and necessity authorizing mail transportation. Sec. 405 (52 Stat. 994, 49 U. S. C. §485(a)).]

merce] Commission may prescribe, which shall be consistent with the requirements of this Act; but any contract so continued in effect may be terminated by the said Commission upon sixty days' notice, upon such hearing and notice thereof to interested parties as the Commission may determine to be reasonable; and may also be terminated by the contractor at its option upon sixty days' notice. On the termination of any air-mail contract, in accordance with any of the provisions of this Act, the Postmaster General may let a new contract for air-mail service over the route affected, as authorized in this Act.

First sentence of above provision superseded by Sec. 6 (c) of amendment of August 14, 1935, set forth under "Express Power to Make Retroactive Adjustments in Specific Situations" (p. B10, *infra*).

Power to Fix Rates From an Effective Date

Sec. 5 subd. 28 (39 Stat. 429, 39 U. S. C. §542) The Interstate Commerce Commission is hereby empowered and directed to fix and de-

Sec. 6 (a) (48 Stat. 935) The Interstate Commerce Commission is hereby empowered and directed, after notice and hearing, to fix and

AUTHORITY TO FIX RATES

Sec. 406 (a) (52 Stat. 998, 49 U. S. C. §486 (a)) The Authority is empowered and directed, upon its

and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same, and orders so made and published shall continue in force until changed by

ticable and from time to time, the fair and reasonable rates of compensation [within the limitations of this Act]* for the transportation of air mail by airplane and the service connected therewith over each air-mail route, [but not in excess of the rates provided for in this Act,]† [and over each section thereof covered by a separate contract,]* prescribing the method or methods

own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other

as authorized in this Act..

First sentence of above provision superseded by Sec. 6 (c) of amendment of August 14, 1935, set forth under "Express Power to Make Retroactive Adjustments in Specific Situations" (p. B10, *infra*).

Power to Fix Rates From an Effective Date

Sec. 5 subd. 28 (39 Stat. 429, 39 U. S. C. §542) The Interstate Commerce Commission is hereby empowered and directed to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same, and orders so made and published shall continue in force until changed by the commission after due notice and hearing.

Sec. 5, subd. 30(g) (39 Stat. 430, 39 U. S. C. §551) At the conclusion of the hearing the Commission shall establish by order a fair, reasonable rate or compensation to be received, at such stated times as may be named in the order, for the transportation of mail matter and the service connected therewith, and during the continuance of the order the Postmaster General shall pay the carrier from the appropriation for inland transportation by railroad routes such rate or compensation.

Sec. 6 (a) (48 Stat. 935) The Interstate Commerce Commission is hereby empowered and directed, after notice and hearing, to fix and determine by order, as soon as practicable and from time to time, the fair and reasonable rates of compensation [within the limitations of this Act]* for the transportation of air mail by airplane and the service connected therewith over each air-mail route, [but not in excess of the rates provided for in this Act,]† [and over each section thereof covered by a separate contract,]* prescribing the method or methods by weight or space, or both, or otherwise, for ascertaining such rates of compensation, and to publish the same, which shall continue in force until changed by the said Commission after due notice and hearing, [and so much of subsection (g) of section 3 of this Act as is in conflict with this section is repealed.]*

* Bracketed words added by amendment of August 14, 1935 (49 Stat. 616).

† Bracketed words deleted by amendment of August 14, 1935 (49 Stat. 616).

Authority to Fix Rates

Sec. 406 (a) (52 Stat. 998, 49 U. S. C. §486 (a) The Authority is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft.

Railway Mail Pay Act of 1916
39 Stat. 425, 39 U. S. C. §§ 524-579

Sec. 3 (39 Stat. 425) That on account of the increased weight of mails resulting from Postmaster General's order numbered seventy-seven hundred and twenty, of December eighteenth, nineteen hundred and thirteen, respecting rates upon and limit of weight of parcel-post packages, effective from January first, nineteen hundred and fourteen, the Postmaster General is authorized to add to the compensation paid for transportation on railroad routes on and after January first, nineteen hundred and fourteen, for the remainder of the contract terms, not exceeding one per centum thereof per annum.

Sec. 4 (39 Stat. 425) That on account of the increased weight of mails resulting from Postmaster General's order numbered seventy-three hundred and forty-nine, of July twenty-fifth, nineteen hundred and thirteen, respecting rates upon the limit of weight of parcel-post packages in the local, first, and second zones, and effective from August fifteenth, nineteen hundred and thirteen, the Postmaster General is authorized to add to the compensation paid for transportation on railroad routes on and after August fifteenth, nineteen hundred and thirteen, for the remainder of the contract terms, not exceeding one-half of one per centum thereof per annum."

Sec. 5, Subd. 1 (39 Stat. 425) That the Postmaster General is author-

Air Mail Acts of 1934 and 1935
48 Stat. 933, 49 Stat. 616

Express Power to Make Retroactive Adjustments in Specific Situations

Sec. 6(c) (49 Stat. 617) Any contract (1) let, extended, or assigned pursuant to the provisions of this Act, and in full force and effect on March 1, 1935, or (2) which may be let subsequent to such date pursuant to the provisions of this Act and shall have been satisfactorily performed by the contractor during its full initial period, shall, from and after such date, or from and after the termination of its initial period, as the case may be, be continued in effect for an indefinite period, and compensation therefor, on and after March 1, 1935, during such period of indefinite continuance, shall be paid at the rate fixed by order of the Commission under this Act, subject to such additional conditions and terms as the Commission may prescribe, upon recommendation of the Postmaster General, which shall be consistent with the requirements and limitations contained in section 1 of this Act; but any contract so continued in effect may be terminated by the Commission upon sixty days' notice upon such hearing and notice thereof to interested parties as the Commission may determine to be reasonable; and may also be terminated, in whole or in part, by mutual agreement of the Postmaster General and the contractor, or for cause by the contractor upon sixty days' notice.

Above provision added in its entirety by amendment of August 14, 1935, super-

Civil Aeronautics Act of 1938
52 Stat. 973, 49 U. S. C. §§ 401-691

See Section 406(a)(1) (*supra*, pp. B8-B9).

Sec. 4 (39 Stat. 425) That on account of the increased weight of mails resulting from Postmaster General's order numbered seventy-three hundred and forty-nine, of July twenty-fifth, nineteen hundred and thirteen, respecting rates upon the limit of weight of parcel-post packages in the local, first, and second zones, and effective from August fifteenth, nineteen hundred and thirteen, the Postmaster General is authorized to add to the compensation paid for transportation on railroad routes on and after August fifteenth, nineteen hundred and thirteen, for the remainder of the contract terms, not exceeding one-half of one per centum thereof per annum."

Sec. 5, Subd. 1 (39 Stat. 425) That the Postmaster General is authorized and directed to readjust the compensation to be paid to railroad companies from and after the thirtieth day of June, nineteen hundred and sixteen, or as soon thereafter as may be practicable, for the transportation and handling of the mails and furnishing facilities and services in connection therewith upon the conditions and at the rates hereinafter provided.

Sec. 5, Subd. 39 (39 Stat. 429) Pending the decision of the Interstate Commerce Commission, as hereinafter provided for, the existing method and rates of railway mail pay shall remain in effect, except on such routes or systems as the Postmaster General shall select, and to the extent he may find it practicable and necessary to place upon the space system of pay in the manner and at the rates provided in this section, with the consent and by order of the Commission under this Act, subject to such additional conditions and terms as the Commission may prescribe, upon recommendation of the Postmaster General, which shall be consistent with the requirements and limitations contained in section 1 of this Act; but any contract so continued in effect may be terminated by the Commission upon sixty days' notice, upon such hearing and notice thereof to interested parties as the Commission may determine to be reasonable; and may also be terminated, in whole or in part, by mutual agreement of the Postmaster General and the contractor, or for cause by the contractor upon sixty days' notice.

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* Above provision added in its entirety by amendment of August 14, 1935, superseding first sentence of Sec. 6(c) set forth under "Fermination of Mail Contracts" (pp. B7-B8, *supra*).

approval of the Interstate Commerce Commission, in order to properly present to the Interstate Commerce Commission the matters hereinafter referred thereto: *Provided,* That if the final decision of the Interstate Commerce Commission shall be adverse to the space system, and if the rates established by it under whatever method or system is adopted shall be greater or less than the rates under this section, the Postmaster General shall readjust the compensation of the carriers on such selected routes and systems in accordance therewith, from the dates on which the rates named in this section became effective.

Factors to be Considered in Setting Rates

Sec. 5, subd. 29 (39 Stat. 429, 39 U. S. C. §543). In fixing and determining the fair and reasonable rates for such service the commission shall consider the relation existing between the railroads as public-service corporations and the Government, and the nature of such service as distinguished, if there be a distinction, from the ordinary transportation business of the railroads.

Sec. 5, subd. 30(i) (39 Stat. 430, 39 U. S. C. §554). For the purposes of [the Railway Mail Pay Act] the Interstate Commerce Commission is hereby vested with all the powers which it is authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers.

Sec. 6(e) (48 Stat. 936) In fixing and determining the fair and reasonable rates of compensation for air-mail transportation, the Commission shall give consideration to the amount of air mail so carried, the facilities supplied by the carrier, and its revenue and profits from all sources, and from a consideration of these and other material elements, shall fix and establish rates for each route which, in connection with the rates fixed by it for all other routes, shall be designed to keep the aggregate cost of the transportation of air mail on and after July 1, 1938, within the limits of the anticipated postal revenue therefrom. [In arriving at such determination the Commission shall disregard losses resulting, in the opinion of the Commission, from the unprofitable maintenance of non-mail schedules, in cases where the Commission may find that the gross receipts from such schedules fail to meet the additional operating expense occasioned thereby. In fixing and determining such rates, if it shall be contended or alleged by the holder of an air-mail contract that the rate of compensation in force for the service involved is insufficient, the burden of establishing such insufficiency and the extent thereof shall be assumed by him. In no case shall the rates fixed and determined by the said Commission hereunder exceed the limits prescribed in section 3(a) of this Act.]*

* Bracketed words added by amendment of August 14, 1935 (49 Stat. 616).

Rate-Making Elements

Sec. 406(b) (52 Stat. 998, 49 U. S. C. §486(b)). In fixing and determining fair and reasonable rates of compensation under this section, the Authority, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Authority shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

Pending Administrative Proceedings

Sec. 1108(b) (52 Stat. 1029, 49 U. S. C. §678(b)) The provisions

Railway Mail Pay Act of 1916 39 Stat. 425, 39 U. S. C. §§ 524-579	Air Mail Acts of 1934 and 1935 48 Stat. 933, 49 Stat. 616	Civil Aeronautics Act of 1938 52 Stat. 973, 49 U. S. C. §§ 401-691
		of this Act shall not affect any proceedings pending before the Secretary of Commerce or the Postmaster General, or proceedings pending before the Interstate Commerce Commission for the determination of rates for the transportation of air mail by aircraft, on the date of the enactment of this Act; but any such proceedings shall be continued, orders therein issued, appeals therefrom taken, and payments made by the Postmaster General pursuant to such orders, as if this Act had not been enacted; and orders issued in any such proceeding shall continue in effect until modified, terminated, superseded, or repealed by the Authority or by operation of law: *Provided*, That the rates determined by the Interstate Commerce Commission shall be determined without regard to that portion of section 6(e) of the Air Mail Act approved June 12, 1934, which provides as follows: "which, in connection with the rates fixed by it for all other routes, shall be designed to keep the aggregate cost of the transportation of air mail on and after July 1, 1938, within the limits of the anticipated postal revenue therefrom".
	Duty to Re-examine Effective Rates	
Sec. 5, subd. 30(h) (39 Stat. 425) (39 U. S. C. §553) Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a reexamination and thereupon substantially similar proceedings shall be had with respect to the rate or rates cov-	Sec. 6(d) (48 Stat. 935) All provisions of section 5 of the Act of July 28, 1916 (39 Stat. 412; U. S. C., title 39, secs. 523 to 568, inclusive), relating to the administrative methods and procedure for the adjustment of rates for carriage of mail by railroads shall be applicable to the ascertainment of rates for the	No specific provision.

or repealed by the Authority or by operation of law: *Provided,* That the rates determined by the Interstate Commerce Commission shall be determined without regard to that portion of section 6(e) of the Air Mail Act approved June 12, 1934, which provides as follows: "which, in connection with the rates fixed by it for all other routes, shall be designed to keep the aggregate cost of the transportation of air mail on and after July 1, 1938, within the limits of the anticipated postal revenue therefrom".

Duty to Re-examine Effective Rates

Sec. 5, subd. 30(h) (39 Stat. 425) (39 U. S. C. §553) Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a reexamination and thereupon substantially similar proceedings shall be had with respect to the rate or rates covered by said application, provided said carrier or carriers have an interest therein.

Sec. 6(d) (48 Stat. 935) All provisions of section 5 of the Act of July 28, 1916 (39 Stat. 412; U. S. C., title 39, secs. 523 to 568, inclusive), relating to the administrative methods and procedure for the adjustment of rates for carriage of mail by railroads shall be applicable to the ascertainment of rates for the transportation of air mail by airplane under this Act so far as consistent with the provisions of this Act.

Sec. 6(b) (48 Stat. 935) The Interstate Commerce Commission is hereby directed at least once in each calendar year from the date of [letting]† [the award]* of any contract [to examine the books, accounts, contracts and entire business records of the holder of each air-mail contract, and]† to review the rates of compensation being paid to [the]† [such]* holder [of such contract]† in order to be assured that no unreasonable profit is [resulting]† [being derived]* or accruing therefrom [and in order to fix just rates].* In determining what may constitute an unreasonable profit the said Commission shall take into consideration [all forms of]† [the]* income derived

No specific provision.

from the operation of airplanes over the routes affected [and in addition to the requirements of sections 3(f) of this Act, shall take into consideration all forms of expenditures of said companies in order to ascertain whether or not the expenditures have been upon a fair and reasonable basis on the part of said company and whether or not the said company has paid more than a fair and reasonable market value for the purchase or rent of planes, engines, or any other types or kind, or class, or goods, or services, including spare parts of all kinds, and whether or not the air-mail contracting company has purchased or rented any kind of goods, commodities, or services from any individuals who own stock in or are connected with the said contracting companies or has purchased such goods and services from any company or corporations in which any of the individuals employed by or owning stock in the air-mail contracting company have any interest or from which such purchases or rents any of the employees or stockholders of air-mail contracting companies would be directly or indirectly benefited. Within thirty days after a decision has been reached upon such review by the Interstate Commerce Commission touching such profit a full report thereof shall be made to the Postmaster General, to the Secretary of the United States Senate, and to the Clerk of the House of Representatives].*

* Bracketed words added by amendment of August 14, 1935 (49 Stat. 617).
† Bracketed words deleted by amend-

companies or has purchased such goods and services from any company or corporations in which any of the individuals employed by or owning stock in the air-mail contracting company have any interest or from which such purchases or rents any of the employees or stockholders of air-mail contracting companies would be directly or indirectly benefited. Within thirty days after a decision has been reached upon such review by the Interstate Commerce Commission touching such profit a full report thereof shall be made to the Postmaster General, to the Secretary of the United States Senate, and to the Clerk of the House of Representatives].*

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* Bracketed words added by amendment of August 14, 1935 (49 Stat. 617).

† Bracketed words deleted by amendment of August 14, 1935 (49 Stat. 617).

Requirement That Carrier Estimate Fair Rate

None

None

Statement of Postmaster General and Carrier

Sec. 406(c) (52 Stat. 998, 49 U. S. C. §486(c)). Any petition for the fixing of fair and reasonable rates of compensation under this section shall include a statement of the rate the petitioner believes to be fair and reasonable. The Postmaster General shall introduce as part of the record in all proceedings under this section a comprehensive statement of all service to be required of the air carrier and such other information in his possession as may be deemed by the Authority to be material to the inquiry.

Railway Mail Pay Act of 1916 39 Stat. 425, 39 U. S. C. §§ 524-579	Air Mail Acts of 1934 and 1935 48 Stat. 933, 49 Stat. 616	Civil Aeronautics Act of 1938 52 Stat. 973, 49 U. S. C. §§ 401-691
	Judicial Review of Rate Orders	
None [See *United States* v. *Griffin*, 303 U. S. 226.]	None	ORDERS OF AUTHORITY SUBJECT TO REVIEW Sec. 1006(a) (52 Stat. 1024, 49 U. S. C. §646) Any order, affirmative or negative, issued by the Authority under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore. VENUE (b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia. NOTICE OF AUTHORITY; FILING OF TRANSCRIPT (c) A copy of the petition shall, upon filing, be forthwith transmitted to the Authority by the clerk of the court; and the Authority shall thereupon certify and file in the court a transcript of the record, if any, upon which the order complained of was entered.

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in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

VENUE

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

[illegible] OF TRANSCRIPT

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Authority by the clerk of the court; and the Authority shall thereupon certify and file in the court a transcript of the record, if any, upon which the order complained of was entered.

POWER OF COURT

(d) Upon transmittal of the petition to the Authority, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Authority. Upon good cause shown, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate: *Provided,* That no interlocutory relief may be granted except upon at least five days' notice to the Authority.

FINDINGS OF FACT BY AUTHORITY CONCLUSIVE

(e) The findings of facts by the Authority, if supported by substantial evidence, shall be conclusive. No objection to an order of the Authority shall be considered by the

court unless such objection shall have been urged before the Authority or, if it was not so urged, unless there were reasonable grounds for failure to do so.

CERTIFICATION OR CERTIORARI

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Authority shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code.

NOTE: The Authority is now known as the Board.

Other Relevant Provisions of the Civil Aeronautics Act

Notice of Tariff Change

Sec. 403(c) (52 Stat. 993, 49 U. S. C. §483(c)): No change shall be made in any rate, fare, or charge, or any classification, rule, regulation or practice affecting such rate, fare or charge or the value of the service thereunder specified in any effective tariff of any air carrier or foreign air carrier, except after thirty days' notice of the proposed change filed, posted, and published in accordance with subsection (a) of this section. Such notice shall plainly state the change proposed to be made and the time such change will take effect. The Authority may in the public interest, by regulation or otherwise, allow such change upon notice less than that herein specified, or modify the requirements of this section with respect to filing and posting of tariffs, either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

Power to Prescribe Rates and Practices of Air Carriers

Sec. 1002(d) (52 Stat. 1018, 49 U. S. C. §642(d)): Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Authority shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for interstate or overseas air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Authority shall determine and prescribe the lawful rate, fare, or charge (or

the maximum or minimum, or the maximum and minimum thereof) thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation or practice thereafter to be made effective: *Provided*, That as to rates, fares, and charges for overseas air transportation, the Authority shall determine and prescribe only a just and reasonable maximum or minimum or maximum and minimum rate, fare, or charge.

RULE OF RATE MAKING

Sec. 1002(e) (52 Stat. 1018, 49 U. S. C. §642(e)). In exercising and performing its powers and duties with respect to the determination of rates for the carriage of persons or property, the Authority shall take into consideration, among other factors—

(1) The effect of such rates upon the movement of traffic;

(2) The need in the public interest of adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service;

(3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;

(4) The inherent advantages of transportation by aircraft; and

(5) The need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service.

Power to Prescribe Divisions of Rates

Sec. 1002(h) (52 Stat. 1018, 49 U. S. C. §642(h)). Whenever, after notice and hearing, upon complaint or upon its own initiative, the Authority is of the opinion that the divisions of joint rates, fares, or charges for air transportation are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the air carriers or foreign air carriers parties thereto, the Authority shall prescribe the just, reasonable, and equitable divisions thereof to be received by the several air carriers. The Authority may require the adjustment of divisions between such air carriers from the date of filing the complaint or entry of order of investigation, or such other date subsequent thereto as the Authority finds to be just, reasonable, and equitable.